(27,497)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 742.

THE STATE OF WYOMING, H. S. RIDGELY, AND THE MIDWEST REFINING COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1919, of said Court, before the Honorable William C. Hook and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the thirteenth day of December, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the United States of America, was Appellant, and H. S. Ridgely, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 Pleas in the District Court of the United States for the District of Wyoming, sitting at Cheyenne.

Be It Remembered, that heretofore, and on, to-wit, the twenty-eighth day of January, in the year of our Lord, one thousand nine hundred and eighteen (1918) came the United States of America, by Charles L. Rigdon, United States Attorney, and Charles D. Hamel, Special Assistant to the United States Attorney, its solicitors, and filed in said court its Bill of Complaint, and sued out of and under the seal of said court, a subpoena in chancery against H. S. Ridgely, Greybull Refining Company and The Midwest Refining Company.

And said Bill of Complaint is in words and figures following, to-wit:

(Bill of Complaint.)

2 United States of America, Plaintiff,
No. 963. vs.
H. S. Ridgely, Greybull Refining Company and The Midwest Refining Company, Defendants.

The United States of America, represented by its undersigned solicitors acting by and under the direction of the Attorney General, brings this its bill of complaint against H. S. Ridgely, Greybull Refining Company, a corporation, and The Midwest Refining Company, a corporation, and alleges:

I.

The defendants Greybull Refining Company and The Midwest Refining Company now are and, at all the times hereinafter mentioned as to them, were corporations organized and existing under and by virtue of the laws of the State of Maine, doing business in the State of Wyoming. The defendant H. S. Ridgely now is and, at all the times hereinafter mentioned as to him, was a citizen of the State of Wyoming.

II.

The plaintiff is and at all the times herein mentioned was the owner and entitled to the possession of certain public land situate in the State of Wyoming and described as follows, to-wit:

3 The North half of the Southeast quarter (N½ SE¼) of Section Nineteen (19), Township Forty-six (46) North, of Range Ninety-eight (98) West of the Sixth Principal Meridian, and of the oil, petroleum, gas and all other minerals contained in said land.

III.

On May 6, 1914, the President of the United States by executive order withdrew the above described together with other designated tracts of public land from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws, and since the 6th day of May, 1914, none of said lands have been subject to occupation or exploration for petroleum, mineral oil or gas, or the initiation by any person or persons of any right or rights under said public land laws.

IV.

On April 4, 1912, the State of Wyoming made application for the above described land as unappropriated nonmineral public land, in lieu of, or as indemnity for,

The South half of the Southeast quarter (S½ SE¼) of Section Thirty-six (36), Township Fifty-three (53) North, of Range Eighty-seven (87) West of the Sixth Principal Meridian,

within the boundaries of the Big Horn National Forest, by filing in the United States Land Office at Lander, Wyoming, Indemnity School Land Selection List No. 180, Serial No. 05521, Lander Series, under the provisions of the Act of Congress of July 10, 1890 (26 Stats. 222), and Sections 2275 and 2276, Revised Statutes of the United States, as amended by the Act of February 28, 1891 (26 Stats. 796), embracing, besides other lands not involved in this suit, the land
4 above described. Said application for selection of said land never was allowed and, on August 17, 1916, said application for selection of said land, as aforesaid, was rejected.

V.

On or about the 24th day of May, 1916, the State of Wyoming, through its State Board of School Land Commissioners, without any lawful authority to do so, made and entered into a pretended oil and gas lease of said lands to one H. S. Ridgely, whereby the said State of Wyoming pretended to lease said land unto the said H. S. Ridgely, his successors and assigns, for the purpose of drilling, boring, operating for

and producing therefrom mineral oil and gas. Thereafter, on or about the 24th day of May, 1916, the said H. S. Ridgely assigned said pretended oil and gas lease to the defendant Greybull Refining Company. Thereafter, on or about the 30th day of June, 1917, the said Greybull Refining Company further assigned said pretended oil and gas lease to the defendant The Midwest Refining Company.

VI.

Subsequent to the 24th day of May, 1916, the defendants, and particularly the Greybull Refining Company and The Midwest Refining Company, in defiance of said order of withdrawal and in violation of the proprietary and other rights of the plaintiff and of the laws of the United States, entered upon said lands and drilled certain wells thereon to the number of fourteen (14), more or less, and the defendants Greybull Refining Company and The Midwest Refining Company have thereon certain mining property, machinery, tools and fixtures necessary to the operation of said oil wells so drilled by them, as herein before alleged.

VII.

Each of the defendants, as plaintiff is informed and believes, and, therefore, alleges, claims some right, title or interest in or to said lands described in paragraph II hereof, or in or to the petroleum or mineral oil or gas extracted therefrom or contained therein, under and by virtue of said application of the State of Wyoming filed in the United States Land Office as aforesaid, and said pretended oil and gas lease from the State of Wyoming to the defendant H. S. Ridgely, and the assignment of said pretended oil and gas lease by said defendant H. S. Ridgely to said defendant Greybull Refining Company, and the assignment of said pretended oil and gas lease by said defendant Greybull Refining Company to said defendant The Midwest Refining Company, and said instruments and the defendant's claim thereunder constitute a cloud upon the title of the United States to said public lands and to the oil and gas deposits therein.

As plaintiff is informed and believes, and therefore alleges, the defendant Greybull Refining Company is owned and controlled by and is a mere subsidiary of the defendant The Midwest Refining Company.

Except as herein stated, the plaintiff has no knowledge of any claims that may be made by the defendants, or either of them, in or to the premises described in paragraph II of

this bill or any part thereof, and calls upon them to assert such claims, if any they have.

Since some time prior to the 20th day of August, 1916, the defendants have been engaged in sinking wells upon said public lands described in paragraph II hereof, and in extracting oil and gas therefrom, all of which oil and gas the defendants have appropriated to their own use and benefit to the great damage of the plaintiff. The plaintiff is unable to state the amount, quantity or value of the oil and gas so extracted and appropriated except, on information and belief, that the same exceeds one hundred thousand (100,000) barrels, of a very high commercial grade and of varying values at the time of production, and aggregating in value many thousands of dollars; and such items of damage can only be ascertained by requiring the defendants to render an accounting therefor.

The defendants are now and intend to continue extracting and appropriating oil and gas from the wells now existing on said public lands described in paragraph II hereof and to sink new wells thereon, and will continue such extraction and appropriation of the supply of oil and gas underlying said lands to the entire exhaustion thereof unless restrained by order of this honorable Court, and the occupation or operation of said lands and the extraction of the oil and gas content thereof by the defendants has been, is and will continue to be detrimental to and destructive of the purposes and policy of the plaintiff with reference to said lands, and an irreparable injury to said lands and to the plaintiff and the people of the United States, which can not be compensated in damages. The greater part of said wells can be successfully shut down and capped so as to conserve said oil content in the ground, but some of them are of such character and so located that continued operations to a limited extent will be necessary to prevent infiltration of water into the oil sands and off-set producing wells on adjoining privately owned lands, and for such operations both conservative and productive the appointment of a receiver to take charge of said property pending the determination of this suit is necessary.

VIII.

That because of the premises of this bill neither of the defendants has or ever has had any right, title or interest in or to, or lien upon, said lands, or any part thereof, or in or to the petroleum or mineral oil or gas therein, or any right to extract petroleum or mineral oil or gas therefrom, or to

convert or dispose of the petroleum or gas so extracted, or any part thereof; that on the contrary the action of the defendants and each of them in entering upon said lands, drilling wells thereon and extracting petroleum or mineral
7 oil and gas therefrom, and using and appropriating the petroleum or mineral oil or gas so extracted therefrom, was and is in violation of the laws of the United States and said order of withdrawal and reservation of said lands, and that all of such acts were and are in violation of the rights of the plaintiff and interfere with and obstruct the execution by the plaintiff of its public policy with respect to said lands.

IX.

The present value of the lands hereinbefore described exceeds one hundred and fifty thousand dollars ($150,000.00).

In consideration of the premises thus exhibited, and inasmuch as plaintiff herein is without full and adequate remedy in the premises save in a court of equity where matters of this nature are properly cognizable and relievable, plaintiff prays:

(1) That a subpoena be issued to each of the defendants requiring each of said defendants to answer this bill within a time to be therein specified.

(2) That the plaintiff be decreed to be the absolute owner of the public lands described in paragraph II hereof and of the product thereof and proceeds therefrom, and that the defendants and each of them be decreed to have no right, title or interest in or to the same or any part thereof.

(3) That the lease and assignments of lease shown in paragraph V hereof be decreed to be null and void and cancelled.

(4) That the defendants and each of them be required to render a full and true account of all of their operations on and with reference to said lands, of all the oil and gas extracted therefrom, the dates of such extraction, the amount, quantity and value thereof, the amounts used and sold and the amounts on hand, and that the plaintiff have and recover from the defendants such amounts as may thereupon be found to be due the plaintiff in kind and in money as the case may be, together with such damages as the plaintiff may be found to have sustained.

(5) That pending the determination of this suit the defendants and their officers, agents and servants be en-
8 joined from further trespassing on any of said lands or from sinking any additional wells thereon or from

extracting oil or gas therefrom, and that upon a final hearing such injunction be made perpetual.

(6) That a receiver be appointed to take charge of all of said lands and the product thereof and proceeds therefrom, with authority to conserve and operate the same under the supervision of the Court pending the final determination of this suit.

(7) That the plaintiff have all such other and further relief as it may be entitled to in equity and good conscience.

CHARLES L. RIGDON,
United States Attorney.
CHARLES D. HAMEL,
Special Assistant to the United States Attorney.
Solicitors for plaintiff.

Henry F. May,
Special Assistant to the
Attorney General,
Of Counsel.

United States of America,
District of Wyoming,
State of Wyoming—ss.

Adelbert Baker, being first duly sworn, deposes and says:

He is now and has been at all the times mentioned in the foregoing bill of complaint Chief of Field Division of the General Land Office at Cheyenne, Wyoming, in charge of field work in Wyoming, and much of said work has been
9 done in investigating facts relating to the lands withdrawn by the President as oil lands on various dates, among them the lands withdrawn by order of May 6, 1914.

That from examination of such lands, or the facts in relation thereto, obtained by him or by special agents or mineral inspectors acting under his direction as such Chief of Field Division, and from examination of the records of the General Land Office and of the local land offices of plaintiff in said State of Wyoming, he is informed as to the matters and things as stated in the complaint with reference to the particular lands therein described; and the matters therein stated are true, except as to those matters therein stated as upon information and belief, and as to those matters he believes them to be true.

ADELBERT BAKER.

Subscribed and sworn to before me, this 28 day of January, 1918.

(Seal) CHARLES J. OHNHAUS,
Clerk of U. S. District Court,
District of Wyoming.

Endorsed: Filed in the District Court on January 28, 1918.

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10 (Summons and Marshal's Return.)

United States of America,
District of Wyoming—ss.

In the District Court of the United States for the District of Wyoming Sitting at Cheyenne.

The President of the United States of America, to H. S. Ridgely, Greybull Refining Company, and The Midwest Refining Company—Greeting:

You and each of you are hereby commanded, that you appear before the Judge of the District Court of the United States, for the District of Wyoming, at the city of Cheyenne, in said District, twenty days from the date hereof, to answer the Bill of Complaint of United States of America, this day filed in the office of the Clerk of said Court, in said city of Cheyenne, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said Bill of Complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the Marshal of the District of Wyoming to execute and make due return.

Witness, the Honorable John A. Riner, Judge of the District Court of the United States, for the District of Wyoming, and the seal of the said District Court, at the city of Cheyenne aforesaid, this 28th day of January, in the year of our Lord one thousand nine hundred and eighteen and of the independence of the United States, the 142nd year.

(Seal.) CHARLES J. OHNHAUS,
Clerk,
By Florence Bradley, Deputy Clerk.

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11 Memorandum.

The above named defendants are hereby notified that unless they and each of them shall file their answer or other defense in the office of the Clerk of said Court, at the city of Cheyenne aforesaid, on or before the twentieth day after service, excluding the day thereof, the Bill of Complaint may be taken pro confesso.

CHARLES J. OHNHAUS, Clerk,
By Florence Bradley, Deputy Clerk.

Return on Service of Writ.

United States of America,
District of Wyoming—ss.

I hereby certify and return that I served the annexed subpoena on the therein-named Midwest Refining Co. Mr. J. B. Barnes, Jr., agent in charge, not being in this district, I obtained service by handing to and leaving a true and correct copy thereof with Mr. N. S. Wilson of the Board of Directors of aforesaid company personally at Casper, Wyo. in said District on the 15th day of February, A. D. 1918.

DANIEL F. HUDSON,
U. S. Marshal,
By Geo. F. English, Deputy.

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12 Marshal's Return.

United States of America,
District of Wyoming—ss.

Cheyenne, February 11th, 1918.

I have duly executed the within writ, by delivering to H. S. Ridgely, January 29th, at Cheyenne, Wyoming, and each of them personally, a true copy of the within writ, at the place and time as follows, to-wit: As to the Greybull Refining Company, upon investigation I found The Greybull Refining Company had on Oct. 23rd, 1917, filed Notice of dissolution of the corporation in the Secretary of State's Office at Cheyenne, Wyoming, therefore could find no officer of the Company to make service on.

This writ therefore returned to Clerk Dist. Court, as the law directs, this 20th day of February, A. D. 1918.

DANIEL F. HUDSON,
Marshal,
By Peter R. Warlaumont,
Deputy Marshal.

Marshal's Fees.

Service, 2 persons, at $2.00 each	$4.00
Mileage, 221 miles at 6c. Going only	$13.26
Expenses	$33.87
Total	$51.13

Paid by Daniel F. Hudson, U. S. Marshal.

Endorsed: Filed in the District Court on February 20, 1918.

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13 (Appearance of Counsel for Defendant H. S. Ridgely.)

The Clerk of said Court will enter our appearance as solicitors and of counsel for the defendant, H. S. Ridgely.

HERBERT V. LACEY,
JOHN W. LACEY,
Solicitors and of Counsel for Defendant, H. S. Ridgely.

Endorsed: Filed in the District Court on February 20, 1918.

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14 (Appearance of Counsel for Defendant, Midwest Refining Company.)

The Clerk of said Court will enter our appearance as solicitors and of counsel for the defendant The Midwest Refining Company.

HERBERT V. LACEY,
JOHN W. LACEY,
Solicitors and of Counsel for Defendant, The Midwest Refining Company.

Endorsed: Filed in the District Court on February 20, 1918.

(Joint Answer of Defendants, H. S. Ridgely and The Midwest Refining Company.)

These defendants now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint cotained, for answer thereunto, or to so much and such parts thereof as these defendants are advised it is material for them to make answer unto, answering say:

They admit that the Midwest Refining Company now is and at all the times mentioned in said bill of complaint as to it, was a corporation organized and existing under and by virtue of the laws of the State of Maine, doing business in the State of Wyoming, and that the defendant, H. S. Ridgely, now is and at all the times in said bill mentioned as to him was a citizen of the State of Wyoming.

And these defendants, and each of them, deny that the plaintiff is the owner or entitled to the possession of the North-half of the Southeast Quarter of Section nineteen (19), Township forty-six (46) North, Range ninety-eight (98) West of the Sixth Principal Meridian, or any portion thereof, or of the oil, petroleum, gas or other minerals contained in said land, or any of them. Defendants, and each of them, admit and aver, however, that until and at the time of the selection of the lands last aforesaid by the State of Wyoming as hereinafter set forth, the said lands last above described were surveyed, unappropriated, public lands of the plaintiff, situated within the State of Wyoming, and that the same had not nor had any thereof been classified, reported, returned or otherwise known to be mineral in character prior to or at the time of said selection.

And these defendants admit that on May 6th, 1914, an executive order was issued by the President of the United States attempting to withdraw the lands above described, together with other designated tracts, from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws of the United States, but defendants, and each of them, deny that the said order was in any wise effective as to the lands last above described for the reason that the same had theretofore been selected by the State of Wyoming as more particularly hereinafter set forth.

And these defendants, and each of them, admit and allege that at the time of the admission of the State of Wyoming into the Union, to-wit, July 10, 1890, the South-half of the

Southeast Quarter of Section thirty-six (36), Township fifty-three (53) North of Range eighty-seven (87) West of the Sixth Principal Meridian, was surveyed, unappropriated, unoccupied, vacant, non-mineral public lands of the United States within the State of Wyoming, and that under and by virtue of Section four of the Act of the Congress of the United States of America approved July 10, 1890, being an act entitled "An Act to Provide for the Admission of the State of Wyoming into the Union and for other purposes," the said lands in said Section 36 were at the date last aforesaid
17 granted to and vested in the State of Wyoming for the support of common schools.

And the defendants, and each of them, deny that the said lands in Section 36, or any of them, had been sold or otherwise disposed of by or under the authority of any act of Congress, and deny that the selection of the North-half of the Southeast Quarter of Section 19, Township 46 North of Range 98 West of the Sixth Principal Meridian, or any of it, was in any wise made under any provision of the said Act of Congress of July 10, 1890.

And these defendants and each of them, admit that heretofore, to-wit, on the 2nd day of February, A. D. 1897, the said lands in Section 36, Township 53 North, Range 87 West of the Sixth Principal Meridian, were by the President of the United States included within the boundaries of the Big Horn National Forest Reserve, but these defendants, and each of them, allege that the said proclamation of the President so including the lands last above described in said Big Horn National Forest Reserve did not in any wise operate to vest the title to said lands in Section 36 in the United States of America, nor in any way divest the title of the State of Wyoming to the said lands, or any part thereof; and these defendants allege that the said proclamation of the President and the constitution of the said Big Horn National Forest Reserve and the inclusion of the said lands in Section 36 within the same took place long after the title to the said lands in said Section 36 had vested absolutely in the State of Wyoming for the support of common schools.

And these defendants admit and allege that after the said lands in said Section 36 were so as aforesaid included within the Big Horn National Forest Reserve, to-wit, on April 4, 1912, the State of Wyoming selected the North-half of the Southeast Quarter of Section 19, Township 46 North of Range 98 West of the Sixth Principal Meridian, which were then unappropriated, surveyed, public lands of the United States of

America, situate within the State of Wyoming, no part
18 of which had been classified, reported, returned or otherwise known to be mineral in character prior to or at the time of said selection, in lieu of the South-half of the Southeast Quarter of Section 36, Township 53 North of Range 87 West of the Sixth Principal Meridian, which had theretofore been included within the said Big Horn National Forest Reserve as aforesaid, and in and by its said selection of said lieu lands waived in favor of the plaintiff its right to the said lands in said Section 36, in exchange with the United States of America for said lands in said Section 19, Township 46 North of Range 98 West of the Sixth Principal Meridian, all of which was done under and pursuant to the provisions of Sections 2275 and 2276 of the Revised Statutes of the United States as amended by the Act of February 28, 1891.

And defendants, and each of them, deny that the said selection of said lands in Section 19, or the waiver of the right of the State of Wyoming to said lands in said Section 36, or either of them, were in any wise under or by virtue of any provisions in said Sections 2275 and 2276 of the Revised Statutes of the United States, or either of said Sections, or any other law of the United States in relation to lands settled upon with a view to preemption or homestead before the survey thereof in the field, or in any wise under any provision of the said Sections of the Revised Statutes of the United States, or either of them, or any other law of the United States granting the right to select indemnity lands where Sections 16 or 36 are found to be mineral lands, or in any wise under any provision in the said Sections, or either of them, or any other law of the United States in relation to compensation of deficiencies for school purposes where Sections 16 or 36 are fractional in quantity or where one or both are wanting by reason of the township being fractional, or for any natural cause whatever. But defendants aver that on the contrary said selection of said lands in said Section 19 and said waiver by the State of Wy-
19 oming of its rights in said Section 36, and each of them, were and are under those provisions of said Sections 2275 and 2276 of the Revised Statutes of the United States, as amended, which authorize the waiver by any State of its vested rights in lands in Section 36 when said Section 36 has fully passed to the State and is thereafter included within a forest reservation, and those provisions of said sections of the statutes which grant other lands of equal acreage in lieu of the said lands in Section 36, the same to be selected from any unappropriated, surveyed, public lands, not miner-

al in character, within the State. And these defendants aver that the said selection of the said lands in Section 19 and the waiver of the rights of the State of Wyoming to the said lands in Section 36 were each and all done and performed in full and strict compliance with law and with the customs and regulations of the Interior Department of the United States governing the matter of selection and waiver in such cases. And these defendants attach hereto a copy of the selection of said lands by the State of Wyoming, marked "Exhibit A", and of the endorsement upon the said selection by the Register and Receiver of the Local Land Office of the District wherein the said lands lie, marked "Exhibit B", and of the non-mineral and non-occupancy affidavit as to the lands in Section 19, marked "Exhibit C", and of the receipt of the Local Land Office for the amount required to be paid by the State of Wyoming upon the said selection, marked "Exhibit D", and of the Non-encumbrance Certificate of the lands in Section 36 filed in connection with the said selection by the States of Wyoming, marked "Exhibit E". And these defendants, and each of them, hereby for greater certainty refer to the said exhibits and make them, and each of them, part of this their answer.

And these defendants, and each of them, further aver that upon the said selection, notice thereof was published and also posted in the office of the Register of said Local Land Office all as required by law and by the regulations of the Interior Department of the United States, that no protest or objection to said selection was filed or made, and that the said Local Land Office where the said selection was filed in all things approved and allowed the said selection, and on the 30th day of April, A. D. 1912, duly reported the same to the Commissioner of the General Land Office, copy of which report is hereto attached, marked "Exhibit F", which is hereby referred to and made part hereof for greater certainty, and defendants aver that said Commissioner of the General Land Office took no action thereon until the 17th day of August, 1916. And these defendants admit that the Secretary of the Interior has failed and refused to approve the said selection so made by the State of Wyoming. And defendants aver that the Interior Department of the United States has entered a final decision so refusing to approve said selection, that said decision was made by the Assistant Secretary of the Interior acting as Secretary on appeal from the Commissioner of the General Land Office to the Secretary of the Interior. But these defendants, and each of them, aver that the said failure to approve and the said refusal to approve were not, nor were

either of them, upon any matter relating to the sufficiency or to the due regularity of the State's application or selection, or to the known character of the said land as mineral or non-mineral at the date of filing said selection, or as to the good faith of the State of Wyoming, or as to its ignorance at the time of its selection of any of the oil deposits since developed on said land. But on the contrary thereof these defendants, and each of them, aver that in and by its said decision, failing and refusing to approve the said selection the Interior Department of the United States distinctly and in terms refused to make any finding whatever in relation to the sufficiency and due regularity of the State's application and selection,
21 and failed and refused to make any finding as to the known character as mineral or non-mineral of the said lands in Section 19 at the date of the filing of said selection, and failed and refused to make any finding as to the good faith of the State of Wyoming in making the said selection, or as to the ignorance of said State at the time of said selection in relation to any oil deposits since developed. And these defendants, and each of them, aver that the sole ground of the failure and refusal of the officers of the Interior Department, having charge of the matter to approve said selection by the State of Wyoming, was and is the claim and pretense that oil has been discovered in said selected lands at a time long since said selection was so as aforesaid made and filed. A copy of the said final decision of the Assistant Secretary of the Interior is hereto attached, marked "Exhibit G", and hereby referred to for greater certainty.

And these defendants, and each of them, aver that the said State of Wyoming in making the said selection acted in entire good faith and fully complied with all and singular the terms and conditions of the statutes in such cases made and provided necessary to entitle said State to become vested with full title to the said selected lands in said Section 19, and thereby acquired a vested interest in the said lands and became the equitable owner thereof. That the said lands at the time of said selection were not by any one known to be mineral in character, and that any change in that condition occurring subsequently to the selection of said lands by the State of Wyoming as aforesaid cannot affect the rights of the State of Wyoming under its said selection.

These defendants admit that heretofore on or about the 24th day of May, 1916, the State of Wyoming, through its State Board of School Land Commissioners, made and entered into an oil and gas lease of said lands to this defendant H. S. Ridgely, whereby the State of Wyoming leased said land

to the said Ridgely, his successors and assigns, for the
22 purpose of drilling, boring, operating for and production therefrom mineral oil and gas; but defendants deny that the said lease was without lawful authority. And these defendants further admit that on or about the 24th day of May, 1916, the said H. S. Ridgely assigned said oil and gas lease to the Greybull Refining Company mentioned in said Bill of Complaint, and that thereafter about the 30th day of June, 1917, the said Greybull Refining Company further assigned said oil and gas lease to this defendant, The Midwest Refining Company.

And defendants further admit that subsequent to the 24th day of May, 1916, this defendant, The Midwest Refining Company, entered upon said lands and drilled certain wells thereon, and that the defendant Midwest Refining Company has on said lands certain mining property, machinery, tools and fixtures necessary to the operation of said oil wells so drilled by them. And defendants deny that the said acts of the said Midwest Refining Company are or ever were in defiance of the order of withdrawal mentioned in said Bill of Complaint or in violation of the proprietary or any other rights of the plaintiff or of the laws of the United States.

And defendants, and each of them, admit and aver that they claim, and have rights, titles and interests in and to said lands in said Section 19, and in and to the petroleum and mineral oil and gas extracted therefrom or contained therein under and by virtue of the said selection by the State of Wyoming filed in the United States Land Office as aforesaid, and under and by virtue of said oil and gas lease from the State of Wyoming to the defendant H. S. Ridgely and the assignment of said lease through mesne assignments to the defendant Midwest Refining Company. And defendants further admit and aver that the State of Wyoming has primary interests in the said lands and the oil and other mineral obtained therefrom and contained therein as owner thereof. And these
defendants admit that the defendant Midwest Refining
23 Company is engaged in extracting oil from the said lands in said Section 19, and have extracted therefrom more than one hundred thousand barrels of a high commercial grade of oil, aggregating in value many thousands of dollars, which said oil and the proceeds thereof these defendants aver belongs to these defendants and to the said State of Wyoming under and pursuant to the terms of the said oil lease so as aforesaid executed by the State of Wyoming.

And these defendants admit that it is their intention and the intention of the State of Wyoming to continue to extract the said oil and to sink new wells upon the said lands in said Section 19 so long as the supply of oil underlying said lands shall be sufficient to warrant such extraction.

And defendants deny that they, or either of them, ever have appropriated or are now appropriating, or intend prior to the settlement of the controversy between the parties hereto, to appropriate any of the oil or gas from any well now existing on said lands or any new well to be sunk thereon; but on the contrary these defendants aver that by an agreement between the parties to this suit and the State of Wyoming, all being represented, for the purpose of fully protecting the rights of all parties it was stipulated that the gross proceeds from the sale and disposition of the oil produced from the said lands less a deduction of ten cents per barrel for operating expenses, should be placed in the Stock Growers National Bank of Cheyenne, to await the outcome of the determination of the title to the land, the money thus accruing to follow the title to the land. And these defendants further aver that under and pursuant to said agreement which was made and entered into as soon as oil was discovered on the said land, the gross proceeds of all the oil produced on said land, less ten cents per barrel as above agreed, have been so deposited with the said The Stock Growers National Bank of Cheyenne, and there remain to await the final settlement of the title to said lands, the said gross proceeds less the deduction aforesaid to become the property of such one
24 or more of the parties as should finally be declared the owner, or owners, of the title to the said lands. And these defendants further aver that pursuant to a further agreement between the parties the said proceeds have been, and as received are being invested in those certain bonds of the United States of America known as "Liberty Bonds", and that by the means aforesaid, through the agreement of the parties as aforesaid, all and singular the gross proceeds of all the oil obtained from the said lands are continually and safely preserved and protected for the use of such of the parties to this suit as may be found entitled thereto. And these defendants further aver that ten cents per barrel, the amount deducted for operating expenses, is less than the actual cost of such production and far less than it would cost the plaintiff herein to produce the said oil in case the plaintiff were found entitled and should proceed in any manner possible to it to cause the oil from said lands to be produced, and far less than it would cost if said oil were produced by a receiver.

And these defendants further deny that any gas has been or is being produced from the said lands. And defendants further aver that the lands on all sides of the lands here in controversy are producing oil lands; that along the north boundary of the lands in controversy six wells are producing on lands immediately adjoining the lands in controversy; that along the south boundary on lands immediately adjoining, six wells are now producing oil; that along the east boundary on adjoining lands, one well is producing oil; that along the west boundary on adjoining lands, one well is producing oil; that each of the said wells on adjoining lands is so close to the boundary of the lands in controversy that the production of oil from the adjoining lands will necessarily drain oil from the lands in controversy, and said adjoining wells make it necessary that wells generally termed "off-setting wells" should operate near the boundary on the lands in controversy opposite each of the said wells on adjoining lands; that otherwise the value of the lands in controversy would be largely destroyed within a short time by the drainage of the oil therefrom through the said wells on adjoining lands. And defendants aver that the total number of wells on the said lands in controversy in operation by the defendant, Midwest Oil Company, is sixteen wells, of which six are off-set wells to an equal number of wells on lands adjoining along the north boundary of the lands in controversy, six are off-set wells to wells on adjoining lands along the south boundary, one is an off-set well to a well on adjoining lands on the east boundary, one is an off-set well to a well on adjoining lands along the west boundary, and one well besides is in operation in the center of each forty acre tract. And defendants now offer to continue the said method of protecting the said funds, and aver that the said method will preserve to the party or parties entitled a larger share of the said funds than would be possible under any receivership or other plan of operation of which they have knowledge, and that it is necessary to continue the operation of the said wells on the lands in controversy, as otherwise the oil in the lands in controversy would be largely lost to the person or persons entitled thereto through the drainage that would be accomplished by wells on adjoining lands as aforesaid.

And these defendants aver that under the facts aforesaid they as lessees of the State of Wyoming have rights in and to the said petroleum or mineral oil, and a right to extract the same, subject to the rights of the State of Wyoming as provided in the said lease to the said defendant, H. S. Ridge-

ly, and that the acts of the defendants in the premises are now, nor are any of said acts, in violation of any right of the plaintiff, nor do they or any of them interfere with or obstruct the execution by the plaintiff of its public policy with reference to said lands, without this that any other matter or thing material or necessary for these defendants to
26 make answer unto and not herein and hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants, all which matters and things these defendants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed and for all other proper relief.

HERBERT V. LACEY,
JOHN W. LACEY,
Solicitors and of Counsel for the Defendant H. S. Ridgely and The Midwest Refining Company.

State of Wyoming,
County of Laramie—ss.

H. S. Ridgely being first duly sworn, on his oath according to law, deposes and says: that he is one of the defendants named as such in the Bill of Complaint in the above entitled cause and one of the answering defendants who make the above joint and several answer; that he has read said answer and that the facts therein set forth are true.

H. S. RIDGELY,

Subscribed in my presence and sworn to before me this 25th day of March, A. D. 1918.

JENNIE M. TUPPER,
(Seal). Notary Public.

27 Endorsed: Filed in the District Court on March 29, 1918.

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28 (Petition of the State of Wyoming for leave to Intervene as a Defendant.)

Comes now the State of Wyoming, appearing by D. A. Preston, its Attorney General, who is hereunto specifically authorized and directed by the Governor of the State of Wyoming, copy of which authority is hereto attached, and moves the Court for leave to intervene and submit itself to the jurisdiction of said Court as a defendant in said cause.

And for grounds of this petition the State of Wyoming shows to this Honorable Court that the State of Wyoming is the owner of the lands in controversy in said cause, and that the defendants named as such in said cause have no other right or title than as lessees from the State of Wyoming, and your petitioner shows to the Court that the proper and full protection of its rights and interests in said lands requires that it be permitted to intervene and set forth its title to and rights in the said lands in controversy.

29 And your petitioner presents herewith the answer to the bill of complaint which it desires to file as intervenor in said cause.

DOUGLAS A. PRESTON
Attorney General of the State of Wyoming and Attorney and of Counsel of the State of Wyoming.

Herbert V. Lacey,
John W. Lacey,
Of Counsel.

The State of Wyoming,
County of Laramie—ss.

D. A. Preston being duly sworn on his oath according to law, deposes and says, that he is Attorney General of the State of Wyoming and appears in said cause as petitioner for the right to intervene on behalf of said State, and is hereunto duly authorized by the Governor of the State of Wyoming. And affiant further says that he has read the foregoing petition for intervention and verily believes that the facts therein set forth are true.

DOUGLAS A. PRESTON.

Subscribed in my presence and sworn to before me this 27th day of March, A. D. 1918.

JENNIE M. TUPPER,
(Seal) Notary Public

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30 (Authority of the Attorney General of the State of Wyoming, to Intervene as a Defendant.)

To the Honorable D. A. Preston, Attorney General of the State of Wyoming.

It has come to my knowledge that suit has been brought by the United States against H. S. Ridgely, The Midwest Refining Company, et al, and that the object of the suit is to

declare that the ownership and right of possession on the North-half of the Southeast Quarter of Section 19, Township 46 North of Range 98 West of the Sixth Principal Meridian, situated in the State of Wyoming, is in the United States of America, and to enforce a claim made by the United States of America for all the oil and other mineral that may be found in said lands, and to the proceeds of any and all mineral that may have been taken therefrom. I am informed that the State of Wyoming has the equitable ownership in and title to said lands by reason of the due selection thereof, accompanied by the surrender to the United States of certain lands owned by the State of Wyoming within a forest reservation, title to which had vested in the said State of Wyoming prior to the time when the same was included within said forest reservation by the United States.

31 In order that the rights of the State of Wyoming may be fully protected, I hereby authorize, empower and direct you to intervene in said suit on behalf of the State of Wyoming, waiving all questions of the jurisdiction of said court over the State of Wyoming in relation to the said matters, and set forth, assert and maintain the rights of the State of Wyoming as may be just and proper.

Done at the Capitol of Wyoming this 13th day of March, in the year of our Lord one thousand nine hundred and eighteen.

FRANK L. HOUX,
Acting Governor of Wyoming.

By the Governor.

Frank L. Houx,
Secretary of State of the State of Wyoming.

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32 (Separate Answer of the State of Wyoming.)

Comes now the State of Wyoming, being authorized to intervene as a defendant in said cause by the order of said Court, and now and at all times hereafter saving and reserving to itself all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's Bill of Complaint contained, for answer thereunto or to so much and such parts thereof as the said State of Wyoming is advised it is material for it to make answer unto, answering says:

It admits that the Midwest Refining Company now is and at all the times mentioned in said Bill of Complaint as to it was a corporation organized and existing under and by virtue

of the laws of the State of Maine, doing business in the State of Wyoming, and that the defendant H. S. Ridgely now is and at all the times in said Bill mentioned as to him was a citizen of the State of Wyoming.

And this intervening defendant denies that the plaintiff is the owner or entitled to the possession of the North-
33 half of the Southeast Quarter of Section 19, Township 46 North, Range 98 West of the Sixth Principal Meridian, or any portion thereof, or of the oil, petroleum, gas or other minerals contained in said lands, or any of them, or any part thereof. And defendant admits and avers that until and at the time of the selection of the lands last aforesaid by this defendant, as hereinafter set forth, the said lands last above described were surveyed, unappropriated, public lands of the plaintiff, situate within the State of Wyoming, and that the same had not, nor had any thereof been classified, reported, returned, or otherwise known to be mineral in character prior to or at the time of said selection.

And this defendant admits that on May 6, 1914, an executive order was issued by the President of the United States attempting to withdraw the lands above described, together with other designated tracts, from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws of the United States, but this defendant denies that the said order was in any wise effective as to the lands last above described for the reason that the same had theretofore been selected by this defendant as is more particularly hereinafter set forth.

And this defendant admits and alleges that this defendant was admitted into the Union as one of the States constituting the United States of America, heretofore, to-wit, on the 10th day of July,1890, and that at the time of said admission the South-half of the Southeast Quarter of Section 36, Township 53 North of Range 87 West of the Sixth Principal Meridian was surveyed, unappropriated, unoccupied, vacant, non-mineral public lands of the United States within the State of Wyoming, and that under and by virtue of Section 4 of the Act admitting this defendant into the Union, to-wit, the Act of Con-
gress of the United States of Amercia, approved July
34 10, 1890, being an act entitled "An Act to provide for the admission of the State of Wyoming into the Union and for other purposes." the said lands in said Section 36 were at the date last aforesaid granted to and vested in this defendand for support of common schools.

And this defendant denies that the said lands in Section 36, or any of them, had been sold or otherwise disposed of by or under the authority of any act of Congress, and denies that the selection of the North-half of the Southeast Quarter of Section 19, Township 46 North of Range 98 West of the Sixth Principal Meridian, or any of it, was in any wise made under any provision of the said Act of Congress of July 10, 1890.

And this defendant admits and alleges that heretofore, to-wit, on the 22nd day of February, A. D. 1897, the said lands in Section 36, Township 53 North 87 West of the Sixth Principal Meridian, were by the President of the United States by official proclamation included within the boundaries of the Big Horn National Forest Reserve, but this defendant alleges that the said proclamation of the President so including the lands last above described within said Big Horn National Forest Reserve did not in any wise operate to vest the title to said lands in Section 36 in the United States of America, nor in any way divest the title of this defendant to the said lands, or any part thereof. And this defendant alleges that the said proclamation of the President and the constitution of the said Big Horn National Forest Reserve and the inclusion of the said lands in Section 36 within the same, took place long after the title to the said lands in Section 36 had vested absolutely in this defendant for the support of common schools.

And defendant admits and alleges that after the said lands in said Section 36 were so as aforesaid included within the Big Horn National Forest Reserve, to-wit, on April 4, 1912, this defendant selected the North-half of the Southeast Quarter of Section 19, Township 46 North of Range 98 West
35 of the Sixth Principal Meridian, which were then unappropriated, surveyed public lands of the United States of America, situate within the State of Wyoming, no part of which had been classified, reported, returned, or otherwise known to be mineral in character prior to or at the time of said selection, in lieu of the said South-half of the Southeast Quarter of Section 36, Township 53 North of Range 87 West of the Sixth Principal Meridian, which had theretofore been included within the Big Horn National Forest Reserve as aforesaid, and in and by its said selection of said lands waived in favor of the plaintiff its right to the said lands in said Section 36, in exchange with the United States of America for said lands in said Section 19, all of which was done under and pursuant to certain provisions contained

in Section 2275 and 2276 of the Revised Statutes of the United States as amended by the Act of February 28, 1891.

And this defendant denies that the selection of said lands in Section 19, or the waiver of the right of this defendant to said lands in Section 36, or either of them, were in any wise under or by virtue of any provisions in said Sections 2275 and 2276 of the Revised Statutes of the United States as amended as aforesaid, or either of said Sections, or of any other law of the United States in relation to lands settled upon with the view to preemption or homestead before the survey thereof in the field, or in any wise under any provisions of the said Sections of the Revised Statutes, or either of them, as amended, or otherwise, or any other law of the United States granting the right to select indemnity lands where said Sections 16 or 36 are found to be mineral lands, or in any wise under any provision in the said Sections, or either of them, as amended, or otherwise, or any other law of the United States in relation to compensation of deficiencies for school purposes where Sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or for any natural cause whatever.

36 But this defendant avers that on the contrary said selection of said lands in said Section 19 and said waiver by this defendant of its rights in said Section 36, and each of them, were and are under those provisions of said Sections 2275 and 2276 of the Revised Statutes of the United States, as amended, which authorize the waiver by any State of its vested rights in lands in Section 36 when said Section 36 has fully passed to the State and is thereafter included within a forest reservation, and those provisions of said sections of the statutes which grant other lands of equal acreage in lieu of the said lands in Section 36, the same to be selected from any unappropriated, surveyed, public lands, not mineral in character, within the State. And this defendant avers that the said selection of the said lands in Section 19, and the waiver of the rights of the State of Wyoming to the said lands in Section 36 were each and all done and performed in full and strict compliance with law and with the customs and regulations of the Interior Department of the United States governing the matter of selection and waiver in such cases. And this defendant attaches hereto a copy of the selection of said lands by this defendant, marked "Exhibit A", and of the endorsement upon the said selection by the Register and Receiver of the Local Land Office of the District wherein the said lands lie, marked "Exhibit B", and of the non-mineral and non-occupancy affidavit as to the

lands in Section 19, marked "Exhibit C," and of the receipt of the local Land Office for the amount required to be paid by the State of Wyoming upon the said selection, marked "Exhibit D", and of the Non-encumbrance Certificate of the lands in Section 36 filed in connection with the said selection by the State of Wyoming, marked "Exhibit E", and this defendant hereby for greater certainty refers to the said exhibits and makes them, and each of them, part of this its answer.

And this defendant further avers that upon its said selection, notice thereof was published and also posted in the office
37 of the Register of said Local Land Office, all as required by law and by the regulations of the Interior Department of the United States, that no protect or objection to said selection was filed or made, and that the said Local Land Office where the said selection was filed in all things approved and allowed the said selection, and on the 30th day of April, A. D. 1912, duly reported the same to the Commissioner of the General Land Office, copy of which report is hereto attached marked "Exhibit F", which is hereby referred to and made part hereof for greater certainty, and this defendant avers that said Commissioner of the General Land Office took no action thereon until the 17th day of August, A. D. 1916. And this defendant admits that the Secretary of the Interior has failed and refused to approve the said selection as made by this defendant? And this defendant avers that the Interior Department of the United States has entered a final decision so refusing to approve said selection; that said decision was made by the Assistant Secretary of the Interior acting as Secretary on appeal from the Commissioner of the General Land Office, but this defendant avers that the said failure to approve and the said refusal to approve were not, nor was either of them, upon any matter relating to the sufficiency or to the due regularity of this defendant's application or selection, or to the known character of the said land as mineral or non-mineral at the date of filing said selection, or upon any matter relating to the good faith of this defendant, or to its ignorance at the time of its selection of any of the oil deposits since developed on said land; but on the contrary thereof this defendant avers that in and by its said decision so as aforesaid finally failing and refusing to approve the said selection, the Interior Department of the United States distinctly and in terms refused to make any finding whatever in relation to the sufficiency or in relation to the due regularity of this defendant's said application and selection, and failed and re-
38 fused to make any finding as to the known character as mineral or non-mineral of the said lands in Section 19

at the date of the filing of said selection, and failed and refused to make any finding as to the good faith of this defendant in making the said selection, and failed and refused to make any finding as to the ignorance of this defendant at the time of said selection in relation to any oil deposits within the said lands. And this defendant avers that the sole ground of the failure and refusal of the officers of the Interior Department having charge of the matter to approve said selection so made by this defendant was and is the claim and pretense that oil has been discovered in said selected lands at a time long since said selection was so as aforesaid made and filed. A copy of the said final decision of the Assistant Secretary of the Interior is hereto attached marked "Exhibit G", and hereby referred to for greater certainty.

And this defendant avers that in making the said selection it acted in entire good faith and fully complied with all and singular the terms and conditions of the statutes in such cases made and provided necessary to entitled it to become vested with full title to the said selected lands in said Section 19, and fully complied with all and singular the terms and conditions of the rules and regulations of the Interior Department of the United States in making the said selections, and thereby acquired a vested interest in the said lands and became the equitable owner thereof. And defendant avers that the said lands in Section 19 at the time of said selection were not by any one known to be mineral in character, and that any change in that condition occurring subsequently to the selection of said lands by this defendant, as aforesaid, cannot affect the rights of the defendant under its said selection.

This defendant admits that heretofore, to-wit, on or about the 24th day of May, 1916, this defendant through its State Board of School Land Commissioners thereunto authorized, made and entered into an oil and gas lease of said lands
39 to the defendant H. S. Ridgely, whereby this defendant leased said lands to the said Ridgely, his successors and assigns, for the purpose of drilling, boring, operating for and [production] therefrom mineral oil and gas; but this defendant denies that the said lease was without lawful authority. And this defendant further admits that on or about the 24th day of May, 1916, the said defendant H. S. Ridgely assigned said oil and gas lease to the Greybull Refining Company mentioned in the said Bill of Complaint, and that thereafter about the 30th day of June, 1917, the said Greybull Refining Company further assigned said oil and gas lease to the defendant The Midwest Refining Company.

And this defendant further admits that subsequent to the 24th day of May, 1916, the defendant, The Midwest Refining Company, entered upon said lands and drilled certain wells thereon, and that the defendant Midwest Refining Company has on said lands certain mining property, machinery, tools and fixtures necessary to the operation of said oil wells so drilled by it, and this defendant denies that the said acts of the said Midwest Refining Company are or ever were in defiance of the order of withdrawal mentioned in said Bill of Complaint, or in violation of the proprietary or any other rights of the plaintiff or of the laws of the United States.

And this defendant admits and avers that it claims and has rights, titles and interests in and to the said lands in said Section 19, and in and to the petroleum and mineral oil and gas extracted therefrom or contained therein under and by virtue of the said selection by this defendant. And defendant further admits and avers that it has the primary interests in the said lands and the oil and other minerals therein contained and taken therefrom as the actual owner thereof. And this defendant admits that the defendant, Midwest Refining Company, is engaged in extracting oil from the said lands in said Section 19, and has extracted therefrom more than one hundred thousand barrels of a high commercial grade of oil, aggregating in value many thousands of dollars, which said oil and the proceeds thereof this defendant avers belongs to it and its co-defendants herein.

And upon information and belief this defendant admits that it is the intention of the said Midwest Refining Company to continue to extract the said oil and to sink new wells upon the said lands in said Section 19 so long as the supply of oil underlying said land shall be sufficient to warrant such extraction, in which intention this defendant concurs.

And this defendant denies that it is now appropriating, or ever appropriated or intends prior to the settlement of the controversy between the parties hereto to appropriate any of the oil or gas from any well now existing on said lands or any new well to be sunk thereon; but on the contrary this defendant avers that by an agreement between the parties hereto, all being represented, it was stipulated that the gross proceeds from the sale and disposition of the oil produced from the said lands less a deduction of ten cents per barrel for operating expenses, should be placed in the Stock Growers National Bank of Cheyenne, to await the outcome of the determination of the title to the land, the money thus accruing to follow the title to the land. And this defendant further avers

that under and pursuant to said agreement which was made and entered into as soon as oil was discovered on the said land, the gross proceeds of all the oil produced on said land, less ten cents per barrel as above agreed, have been so deposited with the said The Stock Growers National Bank of Cheyenne, and there remain to await the final settlement of the title to said lands, the said gross proceeds less the deduction aforesaid to become the property of such one or more of the parties as should finally be declared the owner, or owners, of the
41 title to the said lands. And this defendant further avers that pursuant to a further agreement between the parties the said proceeds have been, and as received are being invested in those certain bonds of the United States of America known as "Liberty Bonds", and that by the means aforesaid, through the agreement of the parties as aforesaid, all and singular the gross proceeds of all the oil obtained from the said lands are continually and safely preserved and protected for the use of such of the parties to this suit as may be found entitled thereto. And this defendant further avers that ten cents per barrel, the amount deducted for operating expenses, is less than the actual cost of such production and far less than it would cost the plaintiff herein to produce the said oil in case the plaintiffs were found entitled and should proceed in any manner possible to it to cause the oil from said lands to be produced, and far less than it would cost if said oil were produced by a receiver. And this defendant further denies that any gas has been or is being produced from the said lands. And this defendant further avers that the lands on all sides of the lands herein controversy are producing oil lands; that along the north boundary of the lands in controversy six wells are producing on lands immediately adjoining the lands in controversy; that along the south boundary on lands immediately adjoining, six wells are now producing oil; that along the east boundary on adjoining lands, one well is producing oil; that along the west boundary on adjoining lands, one well is producing oil; that each of the said wells on adjoining lands is so close to the boundary of the lands in controversy that the production of oil from the adjoining lands will necessarily drain oil from the lands in controversy, and said adjoining wells make it necessary that wells generally termed "off-setting wells" should operate near the boundary on the lands in controversy opposite each of the said wells on adjoining lands; that otherwise the value of
42 the lands in controversy would be largely destroyed within a short time by the drainage of the oil therefrom through the said wells on adjoining lands. And this defendant avers that the total number of wells on the said lands

in controversy in operation by the defendant, Midwest Oil Company, is sixteen wells, of which six are off-set wells to an equal number of wells on lands adjoining along the north boundary of the lands in controversy, six are off-set wells to wells on adjoining lands along the south boundary, one is an off-set well to a well on adjoining lands on the east boundary, one is an off-set well to a well on adjoining lands along the west boundary, and one well besides is in operation in the center of each forty acre tract. And this defendant now offers to continue the said method of protecting the said funds, and avers that the said method will preserve to the party or parties entitled a larger share of the said funds than would be possible under any receivership or other plan of operation of which it has knowledge, and that it is necessary to continue the operation of the said wells on the lands in controversy, as otherwise the oil in the lands in controversy would be largely lost to the person or persons entitled thereto through the drainage that would be accomplished by wells on adjoining lands as aforesaid.

And this defendant avers that under the facts aforesaid this defendant is the owner of the said lands and entitled to every right and interest therein save and excepting as it has disposed of certain interests under the leases aforesaid, and that the acts of the defendants in the premises are not, nor are any of said acts in violation of any right of the plaintiff, nor do they or any of them interfere with or obstruct the execution by the plaintiff of its public policy with reference to said lands, without this, that any other matter or thing ma-
43 terial or necessary for this defendant to make answer unto and not herein and hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver, maintain and approve as this Honorable Court shall direct, and humbly prays to be hence dismissed, and for all other proper relief.

DOUGLAS A. PRESTON,
Attorney General of the State of Wyoming
and of Counsel for the State of Wyoming,
being hereunto specially authorized.

Herbert V. Lacey,
John W. Lacey,
Of Counsel.

The State of Wyoming,
County of Laramie—ss.

D. A. Preston, being first duly sworn on his oath according to law, deposes and says: that he is the Attorney General of

the State of Wyoming, and makes the above intervening answer by order and direction of said State; that he has read said answer after having investigated the facts on which the same is founded, and that the facts therein set forth are true.

DOUGLAS A. PRESTON,

Subscribed in my presence and sworn to before me this 27th day of March, A. D. 1918.

(Seal) JENNIE M. TUPPER,
Notary Public.

44 (Endorsed): Petition of the State of Wyoming to Intervene and Separate Answer of the State of Wyoming; Filed in the U. S. District Court on March 29, 1918.

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45 (Order permitting the State of Wyoming to Intervene as a Defendant, etc.)

Come now the parties by their counsel and State of Wyoming now presents to the Court her petition for leave to intervene as a defendant in said cause, submitting herself to the jurisdiction of this Court, and the plaintiff neither objects nor consents but submits the matter to the Court for its decision.

And upon the said petition of the State of Wyoming leave is now granted to the said petitioner to intervene as a defendant in said cause. And leave is granted to the State of Wyoming to file as her answer to the Bill of Complaint the answer attached to the petition for leave to intervene. And the said answer is now filed.

And said cause upon consent of all the parties has now been set down for final hearing for Monday, June 3, A. D.
46 1918.

Dated this 6th day of May, A. D. 1918.

JOHN A. RINER, Judge.

Endorsed: Filed in the District Court on May 6, 1918.

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47 (Order of Submission.)

This cause comes on now to be heard on final hearing on the Bill of Complaint, Answers of defendants, H. S. Ridgely, and The Midwest Refining Company, Answer of Intervenor, State of Wyoming, Testimony and Exhibits, Heary F. May, Esquire, Special Assistant to Attorney General, and Charles L. Rigdon, Esquire, District Attorney, appearing as

Solicitors for complainants, and John W. Lacey, Esquire, and D. A. Preston, Esquire, Attorney General for the State of Wyoming, appearing as Solicitors for defendants and intervenor, and is argued by counsel and by the Court taken under advisement.

It Is Further Ordered by the Court that the complainants be, and they are hereby, allowed to and including the Seventeenth day of June, A. D. 1918, in which to file their Brief; the defendants to and including June 28, A. D. 1918, to file their Brief; the complainants to and including July 8, A. D. 1918, to file their reply Briefs.

JOHN A. RINER,
Judge.

48 Endorsed: Filed in the District Court on June 3, 1918.

---

49 (Statement of the Evidence.)

The following stipulation was entered into in open court at the hearing of the above entitled cause between the plaintiff and all the defendants, including the State of Wyoming:

It Is Agreed, First: That the base lands in Section Thirty-six (36), which were surrendered, or attempted to have been surrendered by the State of Wyoming, were surveyed, agricultural, nonmineral public lands of the United States, at the time when Wyoming was admitted as a State, and were the property of Wyoming at the time when the State of Wyoming selected, or attempted to select the lands in controversy, in said Section Nineteen (19).

Second: It is agreed that the lands in controversy, at the time of the selection, or attempted selection, by the State of Wyoming, had been classified by the Government in no way as mineral lands.

50 It is agreed that on April 4, 1912, the State of Wyoming relinquished to the United States, so far as was then within its power, the lands in Section Thirty-six (36), constituting the base lands for the selection of the lands here in controversy; the said relinquished lands in Section Thirty-six (36), being the Southeast quarter of Section Thirty-six (36), Township Fifty-three (53) North, Range Eighty-seven (87), the selection in lieu of the lands relinquished included the lands in controversy; that the relinquishment is not agreed by the Government to have been an actual re-

linquishment, but it is agreed by the Government that the State of Wyoming fully complied with any and all statutes, rules and regulations of the Land Department then existing, in so far as, if at all, such relinquishment was authorized by such statutes, rules or regulations.

It Is Agreed that the lands in controversy at the time of their selection, were unappropriated, surveyed, public lands of the United States, within the State of Wyoming.

It Is Stipulated that the defendant, The Greybull Refining Company, has been dissolved as a corporation, and that all of its rights and property became and are now the rights and property of the defendant, The Midwest Refining Company.

Plaintiff then made the following offer:

Mr. May: I wish to offer a certified copy from the records of the United States Land Office, showing the proceedings, including the attempted relinquishment, or attempted selection of the lands in controversy, and all the actions of the land department concerning it, including the final rejection of it by the Land Office.

This copy from the records was introduced and marked Plaintiff's Exhibit "A", the contents of which is fully set forth after rearrangement in order of dates, as follows:

51 Lander, 05521 fsb - 36b

State of Wyo. Department of the Interior full set

Ind. S. S. List United States Land Office. herewith

180 EDS

1 Inc.

W. T. A.

Lander, Wyoming,

April 30, 1912.

Hon. Commissioner,
General Land Office,
Washington, D. C.

Sir:

Enclosed herewith find State of Wyoming Indemnity

School selection List No. 180 which the earlier transmission was overlooked.

Very respectfully,

WILLIAM T. ADAMS
Register.

To Survey

Received
May 6 1912
G. L. O.

---

52 List No. 180. Indemnity School Selections.

Lander Land District.

The State of Wyoming hereby makes application, under the provisions of the act of Congress of July 10, 1890 (26 Stats., 222), and sections 2275 and 2276, Revised Statutes of the United States, and the acts supplementary and amendatory thereto, for the following described unappropriated, non-mineral public lands, in lieu of, or as indemnity for, the corresponding school lands, or losses to its grant for common schools, assigned and designated as bases therefor, and agrees to accept the selected tracts in full satisfaction of the bases assigned, to-wit:

Losses.

Subdivision.												
NE¼	SE¼	Sec.	36	Twp.	53	Range	87	West	6	P. M.	40	Acres
NW¼	SE¼	"	36	"	53	"	87	"	"	"	40	"
S½	SE¼	"	36	"	53	"	87	"	"	"	80	"

And it is hereby certified that the State of Wyoming has not heretofore received indemnity for said assigned bases, or any portion thereof, and that there is not now pending application for indemnity for any base, or portion thereof above assigned.

(Signed) JOSEPH M. CAREY,
Governor,
President State Board of School Land Commissioners.

(Seal)

(Signed) S. G. HOPKINS,
Commissioner Public Lands—
Selecting Agent, Secretary State Board of School Land Commissioners.

The date of examination of the lands as shown on the nonmineral affidavit attached to the original selection is Feb. 12, 1912.

Selections.

"This list must not contain selections aggregating more 640 acres.

Subdivision.										Cause of Loss
SW¼ NW¼	Sec.	13	Twp.	43	Range	100	West	6	P. M. 40 acres	Big Horn Nat'l Forest Reserve
SE¼ NE¼	"	14	"	43	"	100	"	"	" " 40	" "
N½ SE¼	"	19	"	46	"	98	"	"	" " 80	" "

I, S. G. Hopkins, hereby certify that I am the official custodian of the records of the State of Wyoming pertaining to the care and disposal of school lands in said State, that the records of my office show that the State of Wyoming has not sold or disposed of, or contracted to sell or dispose of, any of the lands described in the within list and designated as the basis for indemnity or lieu selection, and that the said lands are not in the possession of or subject to the claim of any person under any law or permission of the State.

(Seal) (Signed) S. G. HOPKINS,
Commissioner of Public Lands.

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53 fsh - 39b

Nonmineral, Nonsaline, and nonoccupancy Affidavit.

Louis G. Phelps, being duly sworn according to law, deposes and says that he is over twenty-one years of age, and a citizen of the United States; that he is well acquainted with the following described lands, to-wit: N½ of SE¼ of Sec. 19, Tp. 46 N., Range 98 W. 6th P. M. Wyoming, and with each and every legal subdivision thereof, having made a personal examination of same on or about February 12th, 1912, that his personal knowledge of said land enables him to testify understandingly with regard thereto, and that to his knowledge there is not within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge any placer, cement, gravel, phosphate, or other valuable mineral deposit; that the land contains no salt spring or deposit of salt in any form sufficient to render it valuable chiefly therefor; that no portion of said land is claimed for mining purpose under the

local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that the land is unappropriated and essentially nonmineral in character, and is not occupied by nor does it contain improvements placed thereon by any Indian, and the same is true as to each and every legal subdivision thereof, and that affiant's post-office address is Meeteetse, Wyoming.

LOUIS G. PHELPS.

I Hereby Certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; the said affiant is to me personally known, and I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was sworn to and subscribed
54 to before me at my office in Cody, Park County, Wyoming, on the 29 day of March, 1912.

(L. S) V. G. LANTRY,
(Seal) Notary Public.

5/6/12?

Note—The foregoing affidavit may be made before any officer, having a seal, authorized by law to administer oaths within the State or Territory where the land is situated, and may be made upon a separate form, embracing proper description of land, and attached with an adhesive over the printed form in the list.

State Selections.

55 fsh - 40b

I, S. G. Hopkins, hereby certify that I am the official custodian of the records of the State of Wyoming pertaining to the care and disposal of school lands in said State; that the records of my office show that the State of Wyoming has not sold or disposed of, or contracted to sell or dispose of any of the lands described in the within list and designated as the basis for indemnity or [liou] selection, and that the said lands are not in the possession of or subject to the claim of any person under any law or permission of the State.

S. G. HOPKINS,
Commissioner of Public Lands.

United States Land Office at Lander, Wyoming.

April 4th, 1912.

We hereby certify that the foregoing list No. 180 of indemnity school land selections, containing 160 acres, was filed

in this office Apr. 4, 1912, accompanied with the legal fees amounting to $2.00; and there is not of record in this office any adverse filing, entry, or claim to the land selected by the State, and that the filing of said list is this day allowed and approved.

WILLIAM T. ADAMS,
Register.

Publication ordered Apr. 4th, 1912, in the Meeteetse News, published at Meeteetse, Wyoming,

W. S. ADAMS,
Register.

Published from day of , 190 , to day of , 190 . (See)

Clerk, G. L.

---

56 fsh 35 b

State Land Notice

Department of the Interior

United States Land Office,

Lander, Wyoming, April 5, 1912.

To Whom it May Concern:

Notice is hereby given that the State of Wyoming has filed in this office application to select lists of land situated in the townships described herein; that the lists are open to public inspection, and a copy thereof by descriptive subdivision has been posted in a convenient place in this office for the inspection of all persons interested and of the public generally.

List 180, serial 05521, for SW¼NW¼, Sec. 13, SE¼NE½, Sec. 14, T. 43 N., R. 100 W., and N½SE¼, Sec. 19, T. 46 N., R. 98 W., 6th P. M., in Wyoming.

Protests or contests against the claim of the State to any of the tracts or subdivisions herein described on the ground that the same is more valuable for mineral than for agricultural purposes will be received for filing prior to approval and certification and forwarded to the General Land office at Washington, D. C. for action.

WILLIAM T. ADAMS,
Register.

C. A.

---

57 (Copy)

Department of the Interior

United States Land Office

Lander, Wyoming,

July 30, 1912.

Lander, 05521.
Transmitting affidavit of publication, certificate of posting, report of C. F. D. and [non-encumbrance] certificate.
4 inc.

C. A.

Honorable Commissioner,
General Land Office,
Washington, D. C.

Sir:

I have the honor to transmit, herewith, affidavit of publication, certificate of posting in this office, report of the C. F. D. #7, and [non-encumbance] certificate, filed in connection with State selection list 180, serial 05521.

Very respectfully,

W. T. ADAMS,

Register.

C. A. C. A.

Received Aug 5, 1912

G. L. O.

---

58 June 10 1912 9 A M

Serial No. 05521.
Act of July 10, 1890.

Affidavit of Publication.

State Land Notice

Receipt No. 813011.

Department of the Interior

Area 160 acres.

United States Land Office,
Lander, Wyoming, April 5, 1912.

To Whom it May Concern:

Notice is hereby given that the State of Wyoming

State of Wyoming,
County of Park—ss.

W. H. Baker, being duly sworn, deposes and says

has filed in this office application to select lists of land in the townships described herein; that the lists are open to public inspection, and a copy thereof by descriptive subdivisions has been posted in a convenient place in this office for the inspection of all persons interested and of the public generally.

List 180, serial 05521, for SW¼ NW¼ section 13, SE¼ NE¼ section 14, township 43 north, range 100 west, and N½ SE¼ section 19, township 46 north, range 98 west, sixth principal meridian in Wyoming.

Protests or contests against the claim of the State to any of the tracts or subdivisions herein described on the ground that the same is more valuable for mineral than for agricultural purposes will be received for filing prior to approval and certification and forwarded to the General Land Office at Washington, D. C. for action.

WILLIAM T. ADAMS,
Register.

April 13, May 11.

that he is the publisher of the Meeteetse News, a newspaper of general circulation published once each week at Meeteetse, in Park County, State of Wyoming; that the notice of State of Wyo. entitled State Land Notice List 180 Ser. 05521 a copy of which is hereto attached was published in said newspaper 5 consecutive weeks, the first publication being on the 13 day of Apr. 1912, and the last on the 11 day of May, 1912, that said notice was printed in every copy of each issue of said paper during the period and times of its publication, in the newspaper proper, and not in the supplement.

W. H. BAKER,
Publisher.

Subscribed and sworn to before me this 13 day of May, 1912.

ROBERT J. McNALLY,
U. S. Commissioner for the District of Wyoming

My commission expires 8 November, 1915.

My commission expires 8 November, 1915.

59

fsh - 33b

Serial No. 05521

Act of July 10, 1890

Receipt No. 813011

Area 160 acres.

The State of Wyoming,
County of Johnson—ss.

I, R. O. Watkins, County Clerk and ex-officio Register of deeds in and for the County of Johnson, in the State of Wyoming, do hereby certify that no instruments are of record or on file in this office, purporting to convey, or in any way encumber the title to any of the following lands,

SE¼ Sec. 36, Twp. 53 Range 87

except a relinquishment from the State of Wyoming to United States assigned as a basis for the selection of indemnity land, State Selection List No. 180, Serial 05521, Lander, U. S. Land Office, Wyoming.

In Testimony Whereof, I have hereunto set my hand and official seal this 10 day of May, A. D. 1912.

R. O. WATKINS,
County Clerk and Ex-officio Register of Deeds for
County.

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60 fsh 34b

Serial No. -5521

Act of July 10, 1890

Receipt No. 813011

Area 160 acres.

Certificate as to Posting of Notice.

Department of the Interior.

U. S. Land Office, Lander, Wyo., Serial No. 05521.

July 30, 1912.

I Hereby Certify that a notice, a copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of 116 days, I having first posted said notice on the 5th day of April, 1912. No protests or contests were filed in this office against the allowance of the selection.

W. T. ADAMS, Register.

the ground that the same is more valuable for mineral than for agricultural purposes will be received for filing prior

to approval and certification and forwarded to the General Land Office at Washington D. C. for action.

WILLIAM T. ADAMS,
Register.

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61 Copy.

fsh—28 b

In reply please [refere] to Lander 05521 "G" J. O'C.

Department of the Interior

General Land Office

Washington

July 29, 1915.

Address only the Commissioner of the General Land Office.

Instructions.

Register and Receiver,
Lander, Wyoming.

Sirs:

On April 4, 1912, there was filed in your office Wyoming indemnity school land selection list No. 180 (Lander 05521), selecting, besides other land, in the N½ SE¼, Sec. 19, T. 46 N., R. 98 W., 6th P. M. The tract described was included in Petroleum Reserve No. 32, by Executive Order of May 6, 1914.

In accordance with paragraph 10-b of departmental instructions of March 20, 1916 (Circular No. 393), under the act of July 17, 1914 (39 Stat., 509), you will advise the State that certification of the selection of the tract described, if made, will contain reservation of the petroleum deposits, in accordance with the act of July 17, 1914, unless within thirty days said State files in your office an application for classification of said land as non-mineral, together with a showing, preferably the sworn statements of experts or practical miners, of the facts upon which is founded the knowl-
62 edge or belief that the land aforesaid is not valuable for mineral. In the event the application is denied, the State will be allowed a hearing at which the burden of proof will be upon it, to show that the tract is not valuable

for petroleum. If it fails to file an application for non-mineral classification within the time allowed, you will so report, and make proper notations on your records.

Very respectfully,

D. K. PARROT,
Assistant Commissioner.

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63 Copy

fsh—24b

Department of the Interior

United States Land Office

Lander, Wyoming, N 6-2-16

May 31, 1916.

Lander 05521
"G" J. O'C.
Transmitting
letter from
State Land Com.
1 inc.
C. A.

Honorable Commissioner,
General Land Office,
Washington, D. C.

Sir:

Referring to above letter, dated July 29, 1915, I transmit, herewith, a letter from S. G. Hopkins, State Land Commission, for the State of Wyoming, declining to accept the limited patent.

Very respectfully,

JOHN W. COOK,
Register.

C. A.

Received
June 5 1916
G. L. O.

---

64 May 31 1916 9 A. M. FSH—25b

transmitted by S. G. Hopkins, Serial No. 05521
State Land Com., Act July 10, 1890
Cheyenne, Wyo. Area 160 Receipt No.

The State of Wyoming

Office of

Commissioner of Public Lands

Cheyenne

S. G. Hopkins, Commissioner
Miss W. F. Stuart, Deputy.

May 25, 1916.

Register and Receiver,
Lander, Wyoming.

Sirs:

I refer to the letter of the Commissioner of the General Land Office to the Register and Receiver, of Lander, Wyoming, Lander 05521, "G", JO'C, dated July 29, 1915, in which the Register and Receiver of the Land office at Lander, are instructed to advise the State of Wyoming that certification of the selection of the N½ SE¼ of Section 19, Township 46 North, Range 98 West of the Sixth P. M., for a limited patent to said tract, will be made under the Act of July 17, 1914 (38 Stat. 509), unless the State applies for a classification of said land as non-mineral and makes a showing that said land is not valuable for mineral.

On April 4, 1912, the State of Wyoming made school land selection No. 180, Lander 05521, selecting, besides other land, the N½SE¼ of Section 19, Township 46 North, Range 98 West of the Sixth P. M., in lieu of the S½SE¼ of Section 36, Township 53 North, Range 87 West, located in the Big Horn Forest Reservation, and in making said selection did relinquish and convey to the United States the said S½SE¼ of Section 36, Township 53 North, Range 87 West.

According to the records of this office, the State of Wyoming has complied with all the provisions of the law with respect to the exchange of lands in the forest reserve for lands lying outside of the forest reserve, and has also complied with all the requirements, rules and regulations with

respect to selection of lands in lieu of lands belonging to the State situated in a forest reserve.

This tract of land in question was selected in lieu of a tract of land granted to the State and situated in a forest reserve. The Department of the Interior has repeatedly held that the State had the right to select land outside of the forest reserves in lieu of lands granted to it within the forest reserves. This is evidenced by the fact that more than three hundred thousand acres of land has been selected by the State of Wyoming outside of the forest reserves in lieu of the lands granted to the State lying within forest reserves, and said selections have been clearlisted to the State, and these lieu selections have been clearlisted to the State without regard as to whether the lands relinquished by the State within the forest reserves were surveyed or unsurveyed.

65 fsh—26b

Register and Receiver, Lander, Wyo., #2

If Congress has authorized the relinquishment by the State of Sections 16 and 36 embraced in a forest reserve and the selection of lands outside of the forest reserve in lieu thereof, and if the State by legislation enactment has authorized such relinquishment and such lieu selections, [the], when the State relinquished the tract of land included in the forest reserve above mentioned, to the United States, and made application for an equal number of acres of land outside of the forest reserve, the right of the State of Wyoming to the lands embraced in said school selection vested in the State at such date. (See Kern Oil Co., et al. vs. Clark, 30 L. D. 550-554) See also Daniels vs. Wagner, 237 U. S. 547).

I am aware, of course, that the Honorable Secretary of the Interior has heretofore taken the position that school selections, such as the one herein mentioned, do not pass title to the lands selected, to the State, unless and until said selection has been approved by the Secretary of the Interior. In this connection, my attention has been called to "Administrative" ruling, 43 L. D. 293, and the authorities cited at the end of said decision. The said rulings of the Secretary of the Interior are entitled to great respect; but inasmuch as the courts of the United States, and especially the Su-

preme Court of the United States, have not passed directly upon the question, and in view of the fact that the State of Wyoming and its officers, long prior to the presidential order of withdrawal of May 6, 1914, and long prior to the Act of July 17, 1914, and long prior to any knowledge on the part of anyone that the lands involved were of mineral character, did all that was required of them under the law and under the rules and regulations of the Land Department, I feel that I should not be called upon to accept the rulings of the Secretary of the Interior in regard to this matter, but to take such action as may eventually have the question referred to the Judiciary Department of the United States Government.

In view of the trust imposed upon the State by virtue of the grant of the lands to the State for school purposes, it would seem that the laws in relation thereto should be liberally construed in favor of the State, to the end that the purpose of the grant may be carried out and the schools of the State receive the greatest benefit possible from the beneficence of Congress.

Congress, in its wisdom, authorized the exchange of lands granted to the State lying within forest reservations for lands outside of the reservations. The Interior Department prescribed rules and regulations providing for such exchanges. It laid down to the State the things it must do in order to select lands in lieu of lands in such reservations. The State did its part. It complied with every requirement of the Government. It relinquished and re-conveyed the land in the forest reservation and selected the tract in lieu of it; it was authorized to do so by act of its own legislature. It has been in possession of the land ever since the approval of the selection by the local land office and the issuance to it of the final receipt.

66 fsh—27 b

Register & Receiver, Lander, Wyo., #3.

At the time of selection and for years afterwards, there was no knowlede upon the part of either the Government or the State, and neither Government or State officials had any reason to believe that the lands selected contained valuable minerals. And now, it seems rather unfair, at this late date, that the parent government shall contend that the

title to this land and the right of the State to it shall depend upon conditions and known facts at this date rather than upon conditions and known facts at the time the selection was made and the State complied with the Act of Congress and the rules prescribed by the Secretary of the Interior.

This land was selected for the benefit of the common schools of the State; and if the Federal Government takes the land from the State now, it takes from the school children of the State the benefit of an income that, in the judgment of the writer they are in all justice entitled to.

The Commissioner for the State feels that the General Government, in dealing with the State in matters of this kind and for this purpose, should be liberal in its construction of the law; that it should not take advantage of its own laches in its failure to clear list this land to the State long before any minerals were discovered thereon, and thus defeat the State's title thereto.

It is admitted that the State's right to this land was initiated prior to that of any mineral entry, and consequently the rights of a mineral entry cannot enter into this question between the State and the Federal Government; and while I fully understand that the State must abide by the laws of the land, and that its property rights must be obtained as individual property rights are obtained under the law, yet, in this case the adjudication of the rights of the State should be based upon the known facts at the time its selection was made and it had complied with the Act of Congress and the requirements of the Department of the Interior.

Holding these views, the Commissioner for the State respectfully declines to accept limited patent for this tract of land and urges that full and complete title to the same may be clearlisted to the State.

Very truly,

S. G. HOPKINS,
Commissioner.

67 (Copy)

fsh—21 b

In reply please refer to Lander 05521 "FS" FSH

1 x R. and R.
1 x C. F. D.

Department of the Interior

General Land Office

Washington

August 17, 1916.

Address only the
Commissioner of the General
Land Office.

Register and Receiver,
Lander, Wyoming.

Sirs:

On April 4, 1912, the State of Wyoming filed indemnity school land selection list No. 180, serial 05521, embracing besides other lands the N½ SE¼ Sec. 19, T. 46 N., R. 98 W. The tract described was included in Petroleum Reserve No. 32, the Executive Order of May 6, 1914, pursuant to the act of June 25, 1910 (36 Stat., 847). The township was suspended from entry, etc., pending resurvey on April 26, 1915, Group 32.

By letter of July 29, 1915, you were directed to issue notice in accordance with the instructions of March 20, 1915, circular No. 393, under the act of July 17, 1914, (38 Stat., 509), to the effect that certification of the tract described if made would contain reservation of the petroleum deposits in accordance with the act of July 17, 1914, unless within thirty days the State filed an application for classification of the land as non-mineral, etc.

On September 23, 1915, you reported that after notice no action had been taken, transmitting as evidence of service registry return receipt signed by the agent of S. G. Hopkins, and on May 31, 1915, you forwarded a letter from S. G. Hopkins, Commissioner of Public Lands of the State of Wyoming, declining to accept patent with reservation of oil and gas to the United States, and asking that full and complete title be clear listed to the State.

The land described being included in a withdrawal under the act of June 25, 1910, the Department has no power to approve the selections except with reservation under the act of July 17, 1914 (Administrative Ruling of the Secretary of the Interior, 43 L. D., 293). The State after due notice having formally refused to accept certification with reservation, such action will be construed as a waiver of and refusal to apply for certification with such reservation or for a non-mineral classification of the land and the selection is therefore hereby held for cancellation as to the N½ SE¼ Sec. 19, T. 46 N., R. 98 W., subject to the right of appeal. You will issue notice hereof immediately and promptly report the action taken hereunder.

Very respectfully,

CLAY TALLMAN,
Commissioner.

D. A. Millrick.

---

68 (Decision of the Department of the Interior.)

Received
March 5, 1917

Commissioner of Public Lands

Department of the Interior
Washington

October 25, 1916.

D-33488

Ex parte
State of Wyoming.

"FS"
Lander—05521
Cancellation of indemnity school land selection.
Affirmed.

Appeal For The General Land Office.

April 4, 1912, the State of Wyoming filed indemnity school land selection list No. 180, Serial 05521, at Lander, Wyoming, embracing the "N½ SE¼, Sec. 19, T. 46 N., R. 98 W., 6th P. M." This land was included in Petroleum Reserve 32, by Executive order of May 26, 1914, made under the act of June 25, 1910 (36 Stat., 847).

July 29, 1915, the Commissioner directed the register and receiver to call upon the State either to apply for a classification of the land as nonmineral or to file its election to take a surface patent under the act of July 17, 1914 (38 Stat., 509). The State failed to file an application for a non-mineral classification and declined to take a patent as provided for under the act of July 17, 1914, supra. The selection was then held for cancellation by the Commissioner in a decision dated August 17, 1916, from which an appeal to the Department has been perfected.

The State contends in effect that having done all that it was required to do when the selection was filed, equitable title vested in it from that date and the later discovery that the land is valuable for oil does not interfere with its right to secure patent for the land in fee instead of the surface patent provided for in the act of July 17, 1914, supra. The appellant further states in its brief—

69 No fault on the part of the State is suggested in any particular regarding the selection here in question. It is not even alleged more or less shown, that this tract was of known mineral character at the time the selection was filed. In fact, we believe it will be conceded that it was not of known mineral character when the State's selection was filed, and that said selection was filed in entire good faith, without regard to the oil since shown to be in valuable quantities beneath its surface.

In support of the State's contentions the cases of Kern Oil Company et al., vs. Clarke (30 L. D., 550), and Daniels vs. Wagner (237 U. S., 547), are cited.

Kern Oil Company et al. vs. Clarke involved forest reserve lieu selections under the act of June 4, 1897 (30 Stat., 11, 34-6), as amended by the act of June 6, 1900, (31 Stat., 588, 614). Particular attention is called to the Department's statement at page 556—

* * * that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.

It is sufficient to point out that Kern Oil Company et al. vs. Clarke as far as the question here involved is concerned, was in effect overruled by the decisions in Miller v. Thompson (36 L. D., 492), and Thomas B. Walker (36 L. D., 495), in which reference was made to the cases of Cosmos Company vs. Gray Eagle Company (190 U. S., 301), and Clearwater Timber Company vs. Shoshone County (155 Fed. Rep., 612.)

In Daniels vs. Wagner the appellant calls particular attention to the third paragraph of its syllabus—

70 One who has done everything essential, exacted either by law or the lawful regulations of the Land Department, to obtain a right from the Land Office conferred upon him by Congress, cannot be deprived of that right either by the exercise of discretion or by a wrong committed by the Land Officers.

Daniels vs. Wagner involved the rights of a forest reserve lieu selector under a prior selection as against individuals who received patent under subsequent homestead and timber and stone entries. The land department there had claimed the right under its discretionary power to reject a prior reserve lieu selection and patent the land to subsequent claimants. This the Supreme Court held was beyond its power. The case in no wise involved the question as to the character of the land, in fact at page 561, the Court expressly refers to this prior decision in Cosmos Company vs. Gray Eagle Oil Company, supra, stating that it had there declined to hold that the land department was not at liberty to determine the question as to the mineral character of the lands sought to be entered because that inquiry arose after entry and before its final allowance.

The grant to the State of Wyoming was made by the act of July 10, 1890, (26 Stat., 222). Section 4 states that the indemnity lands are to be selected within the State in such manner as the legislature may provide "with the approval of the Secretary of the Interior." Section 13 provides "that all mineral lands shall be exempted from the grants made by this act." Section 2276, Revised Statutes, as amended by the act of February 28, 1891, (26 Stat., 796), provides that indemnity selections shall be made "from any unappropriated surveyed public land, not mineral in character."

The Department has uniformly held that no title is acquired by a school indemnity selection until it has been duly

approved. See Tonner vs. O'Neill (15 L. D., 559); Todd vs. State of Washington (24 L. D., 106); Kinkade vs. State of California (39 L. D., 491); State of California et al. (41 L. D., 592); Administrative Ruling of July 15, 1914, (43 L. D., 293). In Kinkade vs. State of California, the second
71 paragraph of the syllabus reads:

No title is acquired under or by virtue of a school indemnity selection until the same has been duly approved and certified, and prior thereto a disclosure that the land is mineral will defeat the selection.

The above statement of the law is given by Lindley (Lindley on Mines, 3rd edition, section 143), as follows:

Be this as it may, until the selection is finally approved by the officers of the government charged with his duty, and the land is certified or listed to the state, the state has no title which it can convey to the purchaser.

Without such approval, neither the state nor its grantee can question any further disposition which the United States may make of the land embraced in the attempted selection.

Among the supporting cases cited by Lindley is that of Wisconsin Central Railroad Company vs. Price County (133 U. S. 496), which involved a railway indemnity selection. The Supreme Court there state at page 513.

The uniform language is, that no title to indemnity lands become vested in any company or in the State until the selections are made; and they are not considered as made until they have been approved, as provided by the Statute, by the Secretary of the Interior.

Under the above authorities the Department is of the opinion that it can not be questioned that title does not vest in the State under a school indemnity selection until said selection has been duly approved and that a discovery of mineral, prior to such approval, will defeat the selection. Such selections are restricted to non-mineral land and the duty is imposed upon the Secretary of the Interior to ascertain such character before giving his approval, and it being ascertained in this case that the land is in character mineral, the selection can not be approved.

The decision of the Commissioner is accordingly affirmed.

(Signed) BO SWEENEY
Assistant Secretary.

72 Motion for Rehearing.

Received
Feb. 22 1917

Commissioner of Public Lands

Department of the Interior

Washington

D-33488 February 17, 1917.

"FS"

Lander 05521

State of Wyoming.

Rejection of school land indemnity selection.

Motion denied.

The State of Wyoming has filed a motion for rehearing in this case in which the Department, by its decision of October 25, 1916, affirmed the action of the Commissioner of the General Land Office, holding the State's indemnity school land selection list No. 80, Serial No. 05521, for cancellation as to the N½ SE¼, Sec. 19, T. 46 N., R. 98 W., 6th P. M., Lander, Wyoming, land district.

April 4, 1912, the State filed its application to select said lands with other tracts not here involved. The tract above described was included in Petroleum Reserve No. 32, by Executive order of May 6, 1914, pursuant to the act of June 25, 1910 (30 Stat., 847), as amended by the act of August 24, 1912 (37 Stat. 497). In connection with the pending motion counsel have conceded the present oil character of the land. They say—

That it is fully understood that since the selection of this land, oil has been discovered, and in paying quantities upon this land, by the lessees of the State, who are in possession of the land.

The State has declined to apply for or accept a restricted patent reserving the oil and gas deposits under the act of June 17, 1914, (38 Stat., 509). The provisions of that act are not here involved.

73 The State contends that upon the filing of a complete application to select, complying with the requirements of the law and departmental regulations, it became possessed of a vested right and interest in the land and entitled to have

its claim adjudicated as of the date of such filing. It is also urged that as approval and certification, when made, will relate back to the date of the filing of the application, conditions existing at that time are controlling, and if the land was then not known to be mineral in character the selection should be approved. With counsel's contention the Department can not agree. Two insuperable barriers preclude approval of this selection. The first is the Executive order withdrawing the land. The second is the fact that the tract is mineral (oil) land. Either of these necessarily stays the hand of the Secretary of the Interior.

The act of June 25, 1910, supra, provides that the President may at any time, in his discretion, withdraw any of the public lands and reserve in same and that such withdrawals and reservations shall remain in force until revoked by him or by an act of Congress. Certain forms of disposition and certain classes of pending claims are specifically excepted from the force and effect of any withdrawal order so made. A school land indemnity selection presented by a State is not so excepted. The Executive withdrawal of May 6, 1914, attached to the land notwithstanding the State's pending application. In the case of State of California et al. (41 L. D., 592-597), it was said:

Moreover, since the President has, on account of their mineral character, withdrawn these lands from disposition, it is evident that the Secretary has no authority to approve the selections, and they must therefore be rejected.

The administrative ruling of July 15, 1914 (43 L. D., 293), concluded as follows:

Congress having power to withdraw lands and devote them to public use, notwithstanding the existence of the inchoate claims mentioned, having authorized the withdrawals
74 and reservations by the act cited, and withdrawals having been made for public purposes, as prescribed in the act, the Secretary of the Interior has no power or authority to approve or accept such selections or exchanges or to relieve them from the force and effect of an existing reservation.

This ruling has been uniformly followed. See the cases of the State of California et at., 44 L. D., 27, 118 and 127. In the face of the outstanding withdrawal this Department can not approve the selection.

Mineral lands do not in any event pass to the State. The act of June 10, 1890 (26 Stat., 222-224), admitting Wyoming to the Union, provides in Section 13:

That all mineral lands shall be exempted from the grants made by this act.

For the school sections in place, if found to be mineral, an equal quantity of other land is to be selected.

Section 14 prescribed:

That all lands granted * * * as indemnity by this act shall be selected under the direction of the Secretary of the Interior.

The act of February 28, 1891 (26 Stat., 796) amending Section 2275 and 2276 Revised Statutes, provides for indemnity selection in general and expressly prescribes that indemnity lands "shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State."

The land department is charged with the duty of determining the character of lands and also it must determine the date subsequent to which the mineral question is foreclosed. The general rule is that when a public land claimant has done all that the law and authoritative regulations prescribe and has obtained an equitable title to and a vested interest in the land, any subsequent discovery or disclosure of mineral does not affect or impair his rights. Until approved by the Secretary of the Interior no equitable title or vested right accrues under an indemnity school land selection.

75 In the case of Wisconsin Railroad Co. vs. Price County, (133 U. S. 496, 512-513) with respect to railroad indemnity, the court used the following language:

Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, until it was executed, created no legal interest which could be enforced in the courts. The doctrine, that until selection made no title vests in any indemnity lands, has been recognized in several decisions of this court.

* * * * * * * * * * * *

The uniform language is, that no title to indemnity lands becomes vested in any company or in the State until the selections are made; and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior.

In the case of the Sioux City Railroad Co. vs. Chicago Railway (117 U. S., 406, 408), it was said:

No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior.

In Stalker vs. Oregon Short Line (225 U. S., 142, 149), it was said:

The principle is that which has been many times applied in conflicting claims of indemnity lands, under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the lists of selections. The same rule has likewise been applied
76 to lists of selections made by States to which a grant has been made subject to location. In both classes of cases, it has been many times ruled that while no vested right against the United States is acquired until the actual approval of the lists of selections, the Company does acquire a right to be preferred over such an intervenor.

This principle with respect to approval has been specifically applied to school indemnity by the Supreme Court of California in the case of Robert vs. Gebhardt (104 Cal. 68; 37 Pac., 782), where it was said:

In the first place, the selection made by the State upon application of the plaintiff was not approved by the Secretary of the Interior, and therefore such attempted selection did not give to the State any legal or equitable right to the land therein described. In the case of Buhne vs. Chism, 48 Cal. 471, this court, in passing upon the effect of such a selection, and the necessity for its approval by the secretary of the interior, said: "We think the approval of the Secretary of the Interior was essential to a valid selection and location by the State; and that it was incumbent on the plaintiff to show affirmatively that he had appproved it. The act of March 3, 1853, provides in terms that the selections shall be

subject to his approval, and we have no authority to dispense with it. This condition was doubtless inserted for the reason that, in the opinion of the highest officer of the land department, the land might be required in the future for public uses; and it was intended that he should exercise his judgment in the premises before the selection should be valid."

* * * * * * * * * * * *

It is the consent of the United States, as manifested by the approval of the Secretary of the Interior, which gives legal efficacy to the application or selection made by the state; and without such approval neither the state nor its grantee is in a position to call in question any future disposition which the United States may make of the land embraced in the attempted selection.

77 See also Cape Modocino Lighthouse Site, 14 Ops. Attys. Gen., 50, and Portage Land Grant, Ib. 645.

The decisions of the Department have uniform to the effect that until approval a state has no vested right or interest as against the Government. In Tonner vs. O'Neill (15 L. D., 559) it was held that no title was acquired by school indemnity selection until the same had been duly approved and certified, and that an attempted sale by the State prior to approval conveyed no right or title to the purchaser. In the case of the State of Washington (36 L. D., 371), it was decided that an approval of the selection was essential to the passing of the title and the acquisition by the selector of a vested right.

It is well settled in departmental practice that the disclosure or discovery of mineral prior to approval defeats an indemnity selection. See the cases of Walker vs. Southern Pacific Railroad Co., (24 L. D., 172); Swank vs. State of California (27 L. S., 411); McQuiddy vs. State of California (29 L. D., 181); Kinkade vs. State of California (39 L. D., 491), and State of California (41 L. D., 592).

From the foregoing it follows that the State of Wyoming has obtained no equitable title or vested right in or to the lands sought. Being mineral lands they are interdicted and do not pass to the State under its grant.

The suggestion that conditions existing at the date of application are controlling is not new and possesses no merit. In the Case of Swank vs. California, supra, the following appears:

It is conceded by the defendants that the land is not subject to the State's selection if it was of known mineral character when the application of the State was filed, but it is contended that the subsequent discovery of mineral therein could not effect the right of the State. This contention is not sound. The law governing the right of the State to indemnity school land is in every essential respect similar to the law governing the right of a railroad company to select indemnity lands under its grant.

78 In the case of Walker vs. Southern Pacific Railroad Co. (24 L. D., 172) the Department held (syllabus):

Prior to the approval of a railroad indemnity selection the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States.

With reference to the case of Cosmos Company vs. Gray Eagle Company (19) U. S., 301), cited in the decision under review, counsel state that they fail to find in that opinion, any support for the decision on appeal herein. In the course of its opinion the Supreme Court, considering a forest lieu selection, said:

The complete equitable title * * * can not exist until a favorable decision by that (land) department has been made regarding the sufficiency of complainant's proof of his right to the selected land. That question the department is competent and it is its duty to decide. It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the land was made in the local land office, and when the patent subsequently issues the legal title will vest from the time of selection. But before any decision is made, how can there be an equitable title? * * * There must be a decision made somewhere regarding the rights asserted by the selector of land under the act before a complete equitable title to the land can exist. The mere filing of papers can not create such title. The application must comply with and conform to the statute and the selector can not decide the question for himself.

We do not see how it can be successfully maintained that, without any decision by any official representing the Government, and by merely filing * * * the selector has thereby acquired a complete equitable title to the selected lands. The selector has not acquired title simply because he has selected land which he claims was at the time of the selection vacant

land open to settlement. * * * Until the various questions of law and fact have been determined by that department in favor of the complainant, it can not be said that it has a
79 complete equitable title to the lands selected.

The foregoing emphasizes the principles that a selector gains no complete equitable title until favorable action or approval by the land department with respect to the selection. The case of Daniels vs. Wagner (237 U. S., 547) is relied upon by the State. It was there held (Syllabus):

One who has done everything essential, exacted either by law or the lawful regulations of the Land Department, to obtain a right from the Land Office conferred upon him by Congress, can not be deprived of that right either by the exercise of discretion or by a wrong committed by the Land Officers.

The case is not in conflict with the principle announced in the Cosmos case. In the Daniels case no question of the mineral character of the land was presented. That controversy was between claimants asserting rights under the non-mineral land laws. Priorities were in question. This Department has disregarded the rights of the prior forest lieu applicant and had patented the lands to junior homestead and timber land claimants. This was done under the assumption that the officials of the land department possessed a broad discretionary power to so dispose of the land upon equitable considerations. The court decided that there was no basis for the assumption of such a discretionary power. The Cosmos Company vs. Gray Eagle Company case was commented upon but was not overruled or modified. The court did not decide that the lieu selector, by compliance with all the essential requirements of the law and regulations, had obtained a vested equitable title to or a vested interest in the land. It was decided that by the acts of the lieu selector he acquired priority and a right that was paramount to subsequent claims.

Counsel have requested that specific findings be made to the sufficiency and due regularity of the State's application, as to the asserted fact that the land was not known to possess mineral value at the date of filing and as to the good faith
80 of the State and its ignorance of the oil deposits since developed, when it applied. Findings with respect to these matters are sought because it is believed that litigation will ensue and that such findings would be of avail on behalf of the State. The Department must decline to undertake an adjudication of the questions suggested. In connection with the present record, where no hearing has been had, matters of good faith and the known character of the land as of the date of filing, can not with propriety be determined. An adjudi-

cation with respect to the questions suggested is not necessary for complete determination as to the validity of the State's application and a final disposition of this case before the Department. The Department is convinced that until a full equitable title arises the question of the mineral character of the land is open for determination. The land here involved having been withdrawn by the Executive and being mineral in character, does not pass to the State under its application to select. The State's proffered school land indemnity selection as to the tract here involved will stand rejected.

The motion for rehearing is denied.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

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81 Copy

feh — 2b

In reply please refer to D 33488
Department of the Interior

Washington

February 17, 1917.

Address only

The Secretary of the Interior

Ex parte

State of Wyoming
vs.

05521 Lander, Wyo.

FS Motion denied Feb. 17, 1917.

The Commissioner of the
General Land Office.

Sir:

I inclose herewith the record in the above-entitled case, the decision of this Department therein having become final.

Very respectfully,
ALEXANDER T. VOGELSANG,
First Assistant Secretary.
TRM

Received
Feb
17
1917

Feb. 19, 1917

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82 Copy fsh — 1 b

In reply please refer to—Lander 05521 "FS" FSH

1x B & G.
1x C. F. D.

Department of the Interior

General Land Office,

Washington, D. C. February 26, 1917.

Ex parte) Involving Indemnity School Land Sel.
) list No. 180 made April 4, 1912 for
State of Wyoming) N½ SE¼ Sec. 19, T. 46 N., R. 98 W.
)
vs.)
)

Register and Receiver,
Lander, Wyoming.

Sir:

In reference to the above-entitled case, you are advised that the decision of the Secretary of the Interior, dated October 25, 1916, ... has become final. Copies of said decision are herewith inclosed, for your information and for your files, and for service on the State.

The case is hereby closed. So note on your records.

The selection is hereby rejected as to the N½ SE¼, Sec. 19, T. 46 N., R. 98 W.

Copies of decision of February 17, 1917, denying motion for rehearing, are also inclosed.

Respectfully,

CLAY TALLMAN, Commissioner.

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83 Copy

Department of the Interior,

General Land Office.

FSH—"FS" Washington, D. C. Feb. 28, 1917

"B"

C R G O

I hereby certify that the annexed copies of papers, on file with Lander 05521, are true and literal exemplifications from the papers in this office.

In Testimony Whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal) D. K. PARROTT,
Acting Assistant Commissioner of the General Land Office.

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84 Plaintiff then made the following offer:

Mr. May: I wish to offer also, the withdrawal order of May 6, 1914, withdrawing the lands in controversy as a part of Petroleum Reserve No. 32.

Judge Lacey: We make no objection as to its form but we do object on the ground that such an order could not affect the vested rights of the State of Wyoming, and we do object to its being admitted in evidence because it is irrelevant here under the issues and under the facts as already shown.

The Court: It is admitted in evidence and you have an exception.

The order was admitted as Plaintiff's Exhibit "B" and is as follows:

Withdrawal of May 6, 1914.

April 30, 1914.

The Honorable,
The Secretary of the Interior.

Sir:

Field investigations by the Geological Survey indicate that the lands in the Bighorn Basin, Wyoming, listed in the accompanying order of withdrawal contain deposits of oil and gas. As these lands are not now withdrawn I recommend the submission to the President of the following order of withdrawal, which involves 88,841 acres.

Respectfully,

GEO. OTIS SMITH, Director.

May 5, 1914.

Respectfully referred to the President with favorable recommendation.

FRANKLIN K. LANE.

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85 Order of Withdrawal.

Petroleum Reserve No. 32, Wyoming No. 8.

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat., 847), entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," as amended by act of Congress August 24, 1912 (37 Stat., 497), it is hereby ordered that the following described lands be, and the same are hereby, withdrawn from settlement, location, sale, or entry, and reserved for classification anw in aid of legislation.

Sixth Principal Meridian.

****

T. 46 N., R. 98 W., Sec. 19, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼; (and other lands).

WOODROW WILSON,
President.

6 May 1914.

Plaintiff then made the following offer:

Mr. May: I wish to read into the evidence two general rules and regulations of the Land Office, which I suppose your Honor would notice if called to your attention anyway, but I would rather have them made a part of the record. One of them is Rule Number Seven from the General Land Office, to registers and receivers, dated March 6, 1903, and found in Vol. 32 of the Decisions of the Department of the Interior, relating to public lands, on page 40. I will ask to have that Rule written in as follows: (Reads Rule to Court)

I wish to offer Rule Number Thirteen, in the general circular of the General Land Office, dated January 10, 1906, and found in Vol. 34 of the Decisions of the Interior Department on page 368, and is as follows:

86 Said rules are as follows:

Rule 7. No application which involves the mineral or nonmineral character of land sought to be selected or made the base for such selection, will be received and forwarded by you, until the preliminary requirements, herinbefore indicated, have been complied with. Upon the State conforming to these requirements, you will receive the selection, certify as to the date of filing thereof, and the condition of the

tracts selected or bases used as shown by your records, and forward the same, together with all showing made either for or against the selection, to this office by special letter, without further action upon the selection. The legal fees payable upon selection will not be received until you are advised by this office that the selection may be admitted. In the meantime, you will take no action looking to a disposal of the land.

Rule 13. The local officers are not authorized to accept the relinquishment of any State selection. All relinquishments will be forwarded to the General Land Office through the local office, when, if accepted, the local officers will be directed to cancel the same on their records, and after such cancellation is noted, and not before, the land will be subject to general disposition under the public-land laws.

By Judge Lacey: These rules, and each of them, are objected to as irrelevant and immaterial to any matter here.

By the Court: The objection is overruled and an exception allowed.

By Mr. May: That is all of the evidence that plaintiff has to offer.

The defendants provisionally offered a certified copy of certain matters relating to the selection and relinquishment, subject to checking to see what ones of them were cov-
87 ered by evidence already introduced, offering so much as was not already covered by Defendant's Exhibit "A". This exhibit, being found to be already covered in full, was not made a part of the record. The defendants, including the State of Wyoming, made the following offer:

By Judge Lacey: I offer in evidence the certified copy of a proclamation of the President, constituting the Big Horn Forest Reserve, by which the lands used as a base here were included within the outer boundaries of a forest reserve. This is offered not for any purpose of showing that it would affect our titles to Section Thirty-six, but to show that it was included within the outer boundaries of the reserve. This proclamation is dated February 22, 1897.

This copy of the proclamation of the President was introduced and marked "Defendants' Exhibit 'B' ", and is as follows:

"(The Big Horn Forest Reserve.)

By the President of the United States of America, A Proclamation.

Whereas, it is provided by section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber-culture laws, and for other purposes", "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the president shall, by public
88 proclamation, declare the establishment of such reservations and the limits thereof";

And whereas, the public lands in the State of Wyoming, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation;

Now, therefore, I Grover Cleveland, President of the United States, by virtue of the power in me vested by section twenty-four of the aforesaid Act of Congress, do hereby make known and proclaim that there is hereby reserved from entry or settlement and set apart as a Public Reservation all those certain tracts, pieces or parcels of land lying and being situate in the State of Wyoming, and within the boundaries particularly described as follows, to-wit:

Beginning at the southeast corner of Township forty-eight (48) North, Range eighty-four (84) West, Sixth (6th) Principal Meridian, Wyoming; thence northerly along the range line to the north-east corner of said township; thence westerly along the Twelfth (12) Standard Parallel North, to the south-east corner of Township forty-nine (49) North, Range eighty-four (84) West; thence northerly along the range line to the north-east corner of Section thirteen (13), Township fifty (50) North, Range eighty-four (84) West; thence Westerly along the section line to the north-east corner of Section seventeen (17), said township; thence northerly along the section line to the southeast corner of Section twenty-nine (29), Township fifty-one (51) North, Range eighty-four (84) West; thence easterly along the section line to the south-east corner of Section twenty-six (26), said township; thence northerly along the section line to the north-east corner of Section two (2), Township fifty-two (52) North,

Range eighty-four (84) West; thence westerly along the Thirteenth (13th) Standard Parallel North, to the south-east corner of Section thirty-five (35), Township fifty-three (53)
North, Range eighty-four (84) West; thence northerly
89 along the section line to the north-east corner of Section fourteen (14), said township; thence westerly along the section line to the north-east corner of Section fourteen (14), Township fifty-three (53) North, Range eighty-five (85) West; thence northerly along the section line to the north-east corner of Section two (2), said township; thence westerly along the township line to the north-east corner of Section two (2), Township fifty-three (53) North, Range eighty-six (86) West; thence northerly along the section line to the north-east corner of Section two (2), Township fifty-four (54) North, Range eighty-six (86) West; thence westerly along the township line to the south-east corner of Township fifty-five (55) North, Range eighty-seven (87) West; thence northerly along the range line to the north-east corner of said township; thence westerly along the township line to the north-west corner of said township; thence southerly along the range line to the south-west corner of said township; thence westerly along the township line to the north-west corner of Township fifty-four (54) North, Range eighty-eight (88) West; thence northerly along the range line between Ranges eighty-eight (88) and eighty-nine (89) West, to the north-west corner of Township fifty-six (56) North, Range eighty-eight (88) West; thence westerly along the Fourteenth (14th) Standard Parallel North, to the south-west corner of Township fifty-seven (57) North, Range eighty-eight (88) West; thence northerly along the range line between Ranges eighty-eight (88) and eighty-nine (89) West, to the point of intersection with the boundary line between the States of Wyoming and Montana; thence westerly along said State boundary line to the point for the unsurveyed range line between Ranges ninety-two (92) and ninety-three (93) West; thence southerly along said unsurveyed range line to the Fourteenth (14th) Standard Parallel North; thence easterly along said standard parallel to the north-east corner of Township fifty-six (56) North, Range ninety-three
(93) West; thence southerly along the range line be-
90 tween Ranges ninety-two (92) and ninety-three (93) West, to the north-west corner of Township fifty-four (54) North, Range ninety-two (92) West; thence easterly along the township line to the north-east corner of said township; thence southerly along the range line to the south-east corner of said township; thence easterly along the town-

ship line to the North-east corner of Township fifty-three (53) North, Range ninety-one (91) West; thence southerly along the range line to the south-east corner of said township; thence easterly along the Thirteenth (13th) Standard Parallel North, to the north-west corner of Township fifty-two (52) North, Range eighty-eight (88) West; thence southerly along the range line between Range eighty-eight (88) and eighty-nine (89) West, to the south-west corner of Township fifty-one (51) North, Range eighty-eight (88) West; hence, easterly along the township line to the south-east corner of said township; thence southerly along the range line between Ranges eighy-seven (87) and eighty-eight (88) West, to the southwest corner of Township forty-nine (49) North, Range eighty-seven (87) West; thence easterly along the Twelfth (12th) Standard Parallel North, to the north-west corner of Township forty-eight (48) North, Range eighty-seven (87) West; thence southerly along the range line to the south-west corner of said township; thence easterly along the township line between Townships forty-seven (47) and forty-eight (48) North, to the south-east corner of Township forty-eight (48) North, Range eighty-four (84) West, the place of beginning.

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filings of record has not expired; and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith;

91 Provided, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land received by this proclamation

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the City of Washington this 22d day of February, in the year of our Lord one thousand, eight hundred and

ninety- seven and of the Independence of the United States the one hundred and twenty-first.

(Seal)

GROVER CLEVELAND.

By the President:

Richard Olney Secretary of State "

Two witnesses were then produced in behalf of all the defendants, including the State of Wyoming, and gave evidence to the effect that they were cattle men and resided in the immediate vicinity of the lands in controversy, were well acquainted with the lands in controversy on April 4, 1912, and for a number of years prior thereto; that the land was included in land used by them for raising hay and cattle until 1915, and prior to the withdrawal order in 1914 was not known as mineral land so far as they knew. This evidence was introduced over the objection to it by the plaintiff as "incompetent, irrelevant and immaterial, and as a question which if material at all must be passed upon by the land office and not by the court, as to the character of this land, in determining whether or not to approve the selection."

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92 The foregoing was all the evidence given, offered or received at the hearing of this cause.

CHARLES L. RIGDON,
United States Attorney.

CHARLES D. HAMEL,
Special Assistant to United States Attorney.
Solicitors for Plaintiff.

Henry F. May

Special Assistant to the Attorney General,
of Counsel.

H. S. RIDGELEY,
HERBERT V. LACEY,
JOHN W. LACEY,
D. A. PRESTON,
Atty Genl. Wyo.

Solicitors for Defendants including the State of Wyoming.

(Approval of the Statement of the Evidence by the District Judge.)

Approved this 28th day of October, 1918
JOHN A. RINER.

Endorsed: Filed in the District Court on October 28, 1918.

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93 (Decree of the District Court, July 15, 1918.)

In the District Court of the United States for the District of Wyoming.

United States of America, Plaintiff,
No. 963. vs.
H. S. Ridgely, Greybull Refining Company, Midwest Refining Company, and the State of Wyoming, Intervenor, Defendant.

This cause came on to be heard at this term upon the bill of complaint, the joint and several answers of the defendants, H. S. Ridgely and the Midwest Refining Company, the petition of the State of Wyoming to intervene as a defendant, the separate answer of the State of Wyoming to the bill of complaint and the evidence taken on behalf of the plaintiff and defendants at the final hearing, and was argued by counsel:

Thereupon, upon consideration thereof, It is now ordered, adjudged and decreed by the court that the plaintiff's bill of complaint herein be and the same is hereby dismissed. To which order and decree, plaintiff by its counsel excepts.

JOHN A. RINER, Judge.

94 Endorsed: Filed in the District Court on July 15, 1918.

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95 (Petition for Appeal.)

To the Honorable John A. Riner, Judge of the United States District Court for the District of Wyoming:

The above named plaintiff, the United States of America, conceiving itself aggrieved by the decree made and entered in this cause on the 15th day of July, A. D. 1918, dismissing the bill of complaint, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in the assignment of errors which is filed herewith, and plaintiff prays that its appeal

may be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri.

96 Dated: August 29th, 1918.

CHARLES L. RIGDON,
United States Attorney.

CHARLES D. HAMEL,
Special Assistant to the United States Attorney.
Solicitors for Plaintiff.

Henry F. May,
Special Assistant to the Attorney General.
Of Counsel.

Endorsed: Filed in the District Court on October 28, 1918.

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97 Assignment of Errors.

Now comes the plaintiff in the above entitled cause by Charles L. Rigdon, Esq., United States Attorney for the District of Wyoming, Charles D. Hamel, Esq., Special Assistant to the United States Attorney, and Henry F. May, Esq., Special Assistant to the Attorney General, and say that the decree entered in the above entitled cause on the fifteenth day of July, 1918, is erroneous, unjust and prejudicial to plaintiff in the following particulars:

I.

The Court erred in making and entering the decree dismissing said bill of complaint.

II.

The Court erred in failing and refusing to enter a decree holding the plaintiff to be the absolute owner of the North Half of the Southeast Quarter (N½ SE¼) of Section 19, Township 46 North, Range 98 West, of the Sixth Principal Meridian, and of the product thereof and the proceeds therefrom.

98 III.

The Court erred in failing and refusing to enter a decree holding that the defendants and each of them have no

right, title or interest in or to the lands described in paragraph II hereof, or any part thereof.

IV.

The Court erred in failing and refusing to enter a decree setting aside, answering and holding for naught, in so far as it affects the title to the lands herein involved, the oil and gas lease dated May 24, 1916, by which the State of Wyoming, through its State Board of School Land Commissioners, purported to lease the lands described in paragraph II unto H. S. Ridgely, his successors and assigns, for the purpose of drilling, boring, operating for and producing therefrom, mineral oil and gas.

V.

The Court erred in failing and refusing to enter a decree setting aside, canceling and holding for naught, in so far as it affects the title to the lands herein involved, the assignment dated May 24, 1916, by which the said H. S. Ridgely purported to assign said oil and gas lease to the Greybull Refining Company.

VI.

The Court erred in failing and refusing to enter a decree setting aside, canceling and holding for naught, in so far as it affects the title to the lands herein involved, the assignment dated June 30, 1917, by which the said Greybull Refining Company purported to assign said oil and gas lease to The Midwest Refining Company.

VII.

The Court erred in failing and refusing to enter a decree requiring the defendants and each of them to render a
99 full and true account of all of their operations on and with reference to the lands described in paragraph II hereof, of all the oil and gas extracted therefrom, the date of such extraction, the amount, quantity and value thereof, the amounts used and sold, and the amounts on hand, and that the plaintiff have and receive from the defendants such amounts as may thereupon be found to be due to plaintiff, in kind and in money, as the case may be, together with such damages as the plaintiff may be found to have sustained.

VIII.

The Court erred in failing and refusing to enter a decree enjoining the defendants and their officers, agents, and servants from further trespassing on any of said lands described in paragraph II hereof or from sinking any additional wells

thereon or from extracting oil or gas therefrom, pending the determination of this suit.

IX.

The Court erred in failing and refusing to enter a decree appointing a receiver to take charge of all of said lands described in paragraph II hereof and the product thereof and the proceeds therefrom with authority to conserve and operate the same under the supervision of the Court pending the final determination of this suit.

Wherefore, plaintiff prays that the said decree be reversed; that the said United States Circuit Court of Appeals for the Eighth Circuit cause the proper decree to be entered, whereby the plaintiff shall be decreed to be the absolute owner of the public lands described in paragraph II hereof and of the product thereof and the proceeds therefrom, and that the defendants and each of them be decreed to have no right, title or interest in or to the same or any part thereof, and
100 such other relief given as the plaintiff may be entitled to receive.

Dated: August 29th, 1918.

CHARLES L. RIGDON,
United States Attorney.

CHARLES D. HAMEL,
Special Assistant to the United States Attorney.
Solicitors for Plaintiff.

Henry F. May,
Special Assistant to the Attorney General.
Of Counsel.

Endorsed: Filed in the District Court on October 28, 1918.

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101 Order Allowing Appeal.

On motion of Charles L. Ridgon, Esq., United States Attorney for the District of Wyoming, Charles D. Hamel, Esq., Special Assistant to the United States Attorney, and Henry F. May, Esq., Special Assistant to the Attorney General, and it appearing to the court that the above named plaintiff has heretofore filed herein its petition for the allowance of an appeal, and concurrently therewith its assignment of errors;

It Is Hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the decree of said court made and entered on the 15th day of July, A. D., 1918, dismissing the bill of complaint herein, be and the same is hereby allowed.

It Is Further Ordered that a transcript of the record, proceedings, papers and exhibits upon which said decree was based, duly authenticated and certified, be forthwith transmitted to said United States Circuit Court of Appeals for the Eighth Circuit.

JOHN A. RINER,
United States District Judge.

102 Endorsed: Filed in the District Court on October 28, 1918.

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103 (Citation and Acknowledgment of Service.)

The United States of America, Plaintiff,
No. 963 vs. In Equity
H. S. Ridgely, Greybull Refining Company, and The Midwest Refining Company, Defendants.

The State of Wyoming, Intervener.

The United States of America—ss.

To H. S. Ridgely, Greybull Refining Company and The Midwest Refining Company, defendants, and The State of Wyoming, Intervener,—Greeting:

You Are Hereby Notified that in a certain case in equity in the United States District Court in and for the District of Wyoming, wherein the United States of America is plaintiff, H. S. Ridgely, Greybull Refining Company and The Midwest Refining Company are defendants, and The State of Wyoming is intervener, an appeal has been allowed the said plaintiff to the United States Circuit Court of Appeals for the Eighth Circuit;

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit in the City of St. Louis, in the State of Missouri, sixty (60) days from and after the date which this citation bears, pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, wherein the United States is appellant and said H. S. Ridgely, Grey-

bull Refining Company and The Midwest Refining
104 Company and the State of Wyoming are appellees, to show cause, if any there be, why the decree entered by said District Court of the United States on July 15th, 1918, dismissing the bill of complaint in said cause should not be reversed and set aside and why speedy justice should not be done the parties in this behalf.

Witness the Honorable John A. Riner, Judge of the District Court of the United States, for the District of Wyoming, at the City of Cheyenne in said district, this 29 day of October, A. D. 1918.

JOHN A. RINER,
Judge.

Service of the above and foregoing citation is hereby acknowledged by and on behalf of the defendants H. S. Ridgely, Greybull Refining Company, The Midwest Refining Company, and the State of Wyoming.

....., 1918.
10/31/'18 H. S. RIDGELEY, HERBERT V. LACEY, JOHN W. LACEY,
Attorneys for Defendants.

10/29/18 D. A. PRESTON,
Attorney General of the State of Wyoming,
Solicitor for State of Wyoming.

Endorsed: Filed in the District Court on October 29, 1918.

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105 (Praecipe for Transcript.)

To the Clerk of said Court:

You will please prepare and duly authenticate transcript of the entire record in the above entitled cause for an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, excluding the formal and immaterial parts of all exhibits, documents and other papers included therein in accordance with Equity Rule No. 76, to-wit:

1. Bill of Complaint;

2. Subpoenas addressed to defendants H. S. Ridgely, Greybull Refining Company and The Midwest Refining Company, and returns of service;

3. Appearance on behalf of defendant H. S. Ridgely;

4. Appearance on behalf of defendant The Midwest Refining Company;

5. Joint answer of defendant H. S. Ridgely and The Midwest Refining Company, omitting exhibits as they are all contained in the statement of the evidence;

106 6. Petition of State of Wyoming to intervene and order thereon and separate answer of the State of Wyoming, omitting exhibits;

7. Record showing submission of cause to court on final hearing;

8. Statement of evidence to be included in the record on appeal;

9. Final decree;

10. Petition for allowance of appeal;

11. Assignment of errors;

12. Order allowing appeal;

13. The citation issued on such appeal showing service thereof;

14. This praecipe.

Dated: October 28, 1918.

CHARLES L. RIGDON,
United States Attorney.

CHARLES D. HAMEL,
Special Assistant to the United States Attorney.
Solicitors for Plaintiff and Appellant.

Henry F. May,
Special Assistant to the
Attorney General.
Of Counsel.

Due service of a copy of the foregoing praecipe at Cheyenne, Wyo. on this 28th day of October, A. D., 1918, up-

on the defendants and appellees is hereby acknowl-
107 edged, and the ten days allowed appellees within which to file praecipe for additional portions of the record to be incorporated into the transcript is hereby waived.

H. S. RIDGELY,
HERBERT V. LACEY,
JOHN W. LACEY,
Attorneys for Defendants and Appellees.

D. A. PRESTON,
Atty. Genl. State Wyoming.

Endorsed: Filed in the District Court on October 31, 1918.

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108 (Clerk's Certificate to Transcript.)

United States of America,
District of Wyoming—ss.

I, Charles J. Ohnhaus, Clerk of the District Court of the United States for the District of Wyoming, do hereby certify the above and foregoing pages (1) to (....), both inclusive, to be a true, correct and complete transcript and copy of the

Bill of Complaint;

Subpoena in Chancery and returns of service;

Appearance on behalf of defendant H. S. Ridgely;

Appearance on behalf of defendant The Midwest Refining Company;

Joint answer of defendant H. S. Ridgely and The Midwest Refining Company, omitting exhibits;

Petition of State of Wyoming to intervene and order thereon, and separate answer of the State of Wyoming, omitting exhibits;

Record showing submission of cause to court on final hearing;

Statement of evidence;

Final decree;

Petition for allowance of appeal;

Assignment of errors;

Order allowing appeal;

Citation, showing service thereof;

Precipe for transcript,

in case No. 963 Civil, United States of America, Plaintiff, vs. H. S. Ridgely, Greybull Refining Company and The Midwest Refining Company, defendants, lately pending in this court.

Seal
U. S. Dist. Court
Dist. of Wyoming

In Testimony to the above I do hereto sign my name, and affix the seal of said court, at Cheyenne, in said district, this tenth day of December, A. D. 1918.

CHARLES J. OHNHAUS,
Clerk of the District Court of the United States for the District of Wyoming.

Filed Dec. 13, 1918. E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(*Appearance of Mr. C. L. Rigdon as Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5334.

UNITED STATES OF AMERICA, Appellant,

vs.

H. S. RIDGELY et al.

The Clerk will enter my appearance as Counsel for the Appellant.

C. L. RIGDON,
U. S. Attorney.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 19, 1918.

(*Appearance of Messrs. Lacey & Lacey as Counsel for Appellees.*)

The Clerk will enter my appearance as Counsel for the Appellees.

HERBERT V. LACEY,
JOHN W. LACEY,
Cheyenne, Wyoming.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 19, 1918.

(*Appearance of Mr. Henry F. May as Counsel for Appellant.*)

The Clerk will enter my appearance as Counsel for the Appellant.

HENRY F. MAY,
Sp'l Ass't to Att'y Gen'l, 214 Post Office Building, San Francisco.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 15, 1919.

(*Appearance of Counsel for Amici Curiæ.*)

The Clerk will enter my appearance as Counsel for the Amici Curiæ.

EDWIN A. MESERVE.
SHIRLEY C. WARD.
JEFFERSON P. CHANDLER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 20, 1919.

(*Appearance of Mr. D. A. Preston as Counsel for Appellees.*)

The Clerk will enter my appearance as Counsel for the Appellees.
D. A. PRESTON.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 20, 1919.

(*Application of Messrs. Meserve, Ward and Chandler for Leave to File Brief as Amici Curiæ.*)

(*Telegram.*)

Los Angeles, Calif.,
Apr. 24, 1919.

Judge Walter H. Sanborn,
United States Circuit Court of Appeals,
St. Paul, Minn.:

Have asked Mr. Thomas F. Fauntleroy of St. Louis by letter to secure permission from your Court for us to file brief as amici curiæ in United States versus Ridgely Number Fifty Three Thirty Four on appeal from District Court of Wyoming on your calendar for hearing at St. Paul May Twentieth involving question as to when title to lieu lands vests in States by selections under section Twenty Two Seventy Five Revised Statutes. Stop. We have not been admitted in your Court but have been in United States Supreme Court and in this Federal Circuit and in Supreme Court of this State. Have sent Mr. Fauntleroy our certificates of admission Supreme Court this State and oath required by your rules. Stop. Mr. Fountleroy wires us no one in St. Louis to act on our request and says he has sent papers to you and suggest- we get in communication with you. Stop. Will not receive our brief from printer until Saturday Twenty Sixth. Would like your order permitting it to be served on counsel, some of whom are in San Francisco and some in Cheyenne not later than May Fifth and filed by that date. Can you have such order entered and your Clerk wire us this permission.

EDWIN A. MESERVE,
SHIRELY C. WARD,
J. P. CHANDLER,
1017 *Union Oil Bldg.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 24, 1919.

(Order Permitting Messrs. Meserve, Ward and Chandler to File and Serve Briefs on or Before May 5, 1919, etc.)

December Term, 1918.

Monday, April 28, 1919.

Upon consideration of the application of Messrs. Meserve, Ward and Chandler, it is hereby ordered that they may file and serve on counsel for the parties in this suit their brief, on or before May 5, 1919, and that their application as amici curiæ to be heard and to have their brief considered by the court is set down for hearing on the day this case is set for hearing on the merits.

April 28, 1919.

(Consent of Appellant That Brief Amici Curiæ Be Considered by the Court.)

It is hereby stipulated that the brief of Messrs. Edwin A. Meserve, Shirley C. Ward and Jefferson P. Chandler, acting as amici curiæ in support of the Appellees' case herein (due service of copy of which brief prior to May 5, 1919, is hereby acknowledged) may be considered by the Court upon the hearing of the appeal herein.

Receipt of copy and acknowledgement of service of Order in the above entitled case, reading as follows, is also hereby admitted prior to May 5, 1919, namely:

"Upon application of Messrs. Meserve, Ward and Chandler,

"It is hereby ordered that they may file and serve on counsel for the parties in this suit, their brief on or before May 5th, 1919, and that their application as amici curiæ to be heard and to have their brief considered by the court, is set down for hearing on the day this case is set for hearing on the merits.

Dated: April 28th, 1919.

(Signed) SANBORN,
Senior Circuit Judge."
HENRY F. MAY,
Special Assistant to the Attorney General.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 6, 1919.

(Stipulation for Consideration by Court of Brief of Amici Curiæ.)

It is hereby stipulated that the brief of Messrs. Edwin A. Meserve, Shirley C. Ward and Jefferson P. Chandler, acting as amici curiæ in support of the Appellees' case herein (due service of copy of which brief prior to May 5, 1919, is hereby acknowledged) may be considered by the Court upon the hearing of the appeal herein.

Receipt of copy and acknowledgement of service of Order in the

above entitled case, reading as follows, is also hereby admitted prior to May 5, 1919, namely:

"Upon application of Messrs. Meserve, Ward and Chandler,

"It is hereby ordered that they may file and serve on counsel for the parties in this suit, their brief on or before May 5th, 1919, and that their application as amici curiæ to be heard and to have their brief considered by the court, is set down for hearing on the day this case is set for hearing on the merits.

Dated: April 28th, 1919.

(Signed) SANBORN,
Senior Circuit Judge."
CHARLES L. RIGDON,
United States Attorney, Solicitor for Appellant.
W. L. WALLS,
Attorney General of Wyoming,
HERBERT V. LACEY,
JOHN W. LACEY,
Solicitors for Appellees.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 8, 1919.

(*Order on Stipulation for Consideration of Brief Amici Curiæ.*)

May Term, 1919.

Tuesday, May 20, 1919.

An order having heretofore been entered in this cause permitting Messrs. Meserve, Ward & Chandler to file and serve their briefs as amici curiæ and, pursuant to written consent of counsel for appellant and stipulation of counsel for all parties filed herein, the Court announced that said briefs filed as amici curiæ will be considered in determining this cause in this Court.

Upon application of counsel for appellant in open Court, leave is granted to file instanter a reply brief to the brief of amici curiæ.

(*Order of Argument.*)

May Term, 1919.

Tuesday, May 20, 1919.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Henry F. May, Special Assistant to the Attorney General, for the appellant, continued by Mr. John W. Lacey for the Appellees and the hour for adjournment having arrived further argument was postponed until tomorrow.

(*Order of Submission.*)

May Term, 1919.

Wednesday, May 21, 1919.

This cause having been called for further hearing, argument was resumed by Mr. John W. Lacey for appellees and concluded by Mr. Henry F. May, Special Assistant to the Attorney General, for the appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1919.

No. 5334.

UNITED STATES OF AMERICA, Appellant,

vs.

H. S. RIDGELY et al., Appellees.

Appeal from the District Court of the United States for the District of Wyoming.

Mr. Henry F. May, Special Assistant to the Attorney General, (Mr. Charles L. Rigdon, United States Attorney, was with him on the brief), for appellant.

Mr. John W. Lacey, (Mr. D. A. Preston, Mr. William L. Walls, Attorney General of the State of Wyoming, Mr. Herbert V. Lacey, and Mr. Hilliard S. Ridgely, were with him on the brief), for appellees.

Mr. Edwin A. Meserve, Mr. Shirley C. Ward, and Mr. Jefferson Chandler, appeared on brief of amici curiæ in support of appellees' case.

Before Hook and Stone, Circuit Judges, and Amidon, District Judge.

AMIDON, *District Judge*, delivered the opinion of the Court:

The State of Wyoming was admitted by Act of Congress on July 10, 1890, (26 Statutes, 224), which granted to it Sections 16 and 36 for educational purposes, with certain indemnity lands in place thereof in case they had been otherwise disposed of, the indemnity lands to be selected with the approval of the Secretary of the Interior. Under this grant the state acquired a perfect title to a certain

Section 36. On February 22, 1897, the Big Horn National Forest Reserve created by proclamation of the President included within its outer boundaries the section referred to, at a time when title thereto had vested absolutely in the state.

On April 4, 1912, the state filed in the proper local land office its application under the provisions of the Act of Congress of July 10, 1890 (26 Statutes, 222), and Sections 2275 and 2276 of the Revised Statutes, and the acts amendatory thereof, for the tract of land involved in the present suit as indemnity for a part of said Section 36. The state did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the government and everything that was required either by statute or regulation of the Land Department to select the land here involved as indemnity for the land so relinquished. Among other things in the showing was an affidavit that the land applied for contained no known deposits of mineral or petroleum, and it was stipulated at the hearing that at the time the application was filed the land "had been classified by the government in no way as mineral lands." The filing of the application was allowed by the local land office, publication ordered, the receipt of the publication fee accepted and all the papers submitted by the state were sent to the Commissioner of the General Land Office on April 30, 1912, with a proper certificate of the local officials showing that the records in their office disclosed no adverse claims to the land selected.

On May 6, 1914, the President, under the terms of the Act of June 25, 1910, (36 Statutes, 847), withdrew as oil land the tract so applied for by the state.

On April 29, 1915, the Commissioner of the General Land Office caused notice to be given to the state advising it that inasmuch as the tract applied for had been withdrawn as oil land, certification of the selection, if made, would contain a reservation of the petroleum deposits under the Act of July 17, 1914, (38 Statutes, 510), unless the state within thirty days filed an application for classification of said land as nonmineral, together with a showing, in which event the state would be allowed a hearing to show that the tract was not valuable for petroleum.

On May 24 of the following year, 1916, the state made what purported to be a lease of the property to defendant Ridgley, for the purpose of drilling for oil thereon, which lease was thereafter by mesne conveyance assigned to defendant, Midwest Refining Company.

By letter dated the day following the date of the lease, to-wit, May 25, 1916, the State replied to the notice given under instructions of the Commissioner last above referred to, declining to accept a surface patent so-called, and instead of asking for a hearing as to the character of the land, claimed that an equitable title had vested in it by virtue of its compliance with the laws and regulations in its application for selection of April 4, 1912.

Thereafter on August 17, 1916, the Commissioner of the General Land Office held the selection for cancellation on the grounds that the land had been withdrawn as oil lands and had been shown to be

such. An appeal was taken by the state to the Secretary of the Interior and the decision of the Commissioner was affirmed on October 25, 1916; and this decision was made final by the Secretary of the Interior on February 26, 1917, on petition for rehearing.

Going back now to developments on the land, in the year 1916 drilling for oil was undertaken by the defendant, Midwest Refining Company, and carried on to discovery and subsequent production. But no discovery was made or drilling commenced until after May 24, 1916, the date of the lease to Ridgely, and nearly a year after the letter of July 29, 1915, from the Commissioner to the State of Wyoming notifying it that if the selection were allowed it would contain a reservation of the petroleum deposits. Since that time production has been carried on by defendant, Midwest Refining Company, and is now being carried on by it from a number of wells making a large production. This suit was brought by the United States to enjoin the continuing trespass involved in such drilling and operation and exhaustion of the oil content of the land, to quiet title in the government and to cancel the various instruments relied on by defendants, as supporting their claim of an equitable title thereto, and for an accounting. The state intervened in the action. It and the other defendants filed separate answers. Evidence was adduced showing the facts substantially as above recited. The trial court dismissed the bill upon the merits and the present appeal seeks a review of that decision.

It is stated in the briefs, and was referred to in the oral arguments, that it is the purpose of all parties in this case to present squarely the question whether or not the state can obtain title to lieu lands by filing its application for selection and complying with all the requirements of the statutes, rules and regulations on its part to be complied with, although its selection never was approved, but prior to action thereon by the Commissioner of the General Land Office and while the application for the selected land was pending before him, the land applied for was shown to be oil land and withdrawn as such, and upon those grounds the selection was rejected.

We think that it has been clearly determined by the Supreme Court that the state down to the time of the approval of the application by the Commissioner of the General Land Office acquires no estate, legal or equitable, in the lands applied for as against the government. The only right which it acquires by its application and the proceedings in the local land office is to be protected against any subsequent right in the tract being acquired by private parties in case the government decides to dispose of the lands as agricultural lands.

This in our judgment is placed beyond controversy by the decision of the Supreme Court in Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 511, 512, and more particularly by the decision in Cosmos Company v. Gray Eagle Oil Co., 190 U. S. 301. The latter case is directly in point. There are minor circumstances in which it differs from the present case, but none of these constitutes a substantial ground of distinction.

In brief the Cosmos case holds that the local officials are not vested

with any jurisdiction to pass upon any of the questions, either of law or fact, involved in the application. Their power is confined to accepting the state's papers, making the proper notation upon their records to protect the application against subsequent rights of private parties, and then transmitting the papers with a certificate showing the tract to be free from adverse claims so far as disclosed by the records in their office, to the Commissioner of the General Land Office. That officer is clothed with jurisdiction not only to pass upon the paper showing made by the state but to make any investigation which he sees fit to determine whether the lands are nonmineral so as to come within the statutes controlling the application. Until he approves of the application there is, as Mr. Justice Fields said in the Price County case, 133 U. S. 511, no selection. In other words, the favorable action of the Commissioner is an element of the selection and until that is obtained the state acquires no title, legal or equitable, to the land. In exercising his jurisdiction the Commissioner is not reviewing the action of the local land officials. His jurisdiction is original and primary. While the case is pending before him the transaction is simply an application to exchange. The government is as free in that transaction as the state.

The case of Daniels v. Wagoner, 237 U. S. 547, does not impair the authority of the Cosmos case, but expressly approves it as to the power of the Commissioner to determine the mineral character of the land applied for. All the Daniels case decides in this: That the applicant for lieu lands, by presenting his application to the local land office, acquires the right as against private individuals whose rights in the property arise subsequently, to be protected against such subsequent private rights; and that the Commissioner of the General Land Office in the name of discretion cannot, while holding the lands subject to disposal as agricultural, timber or desert lands, give the land to a private party whose rights arose after the application to select the indemnity lands was made to the local land office. The Daniels case has nothing to do with the right of the government to decide any question of fact involved in the application to select the land as indemnity. It simply holds that a private individual whose rights arise subsequent to the entry of the application in the local land office cannot be given priority over such applicant. The Supreme Court in the case cited simply holds the Commissioner in exercising his jurisdiction to dispose of the lands as between private parties must give effect to the general doctrine of priorities.

In the argument and briefs there is a great array of authorities holding that it is the "known" mineral quality of lands at the time a right to them is acquired which controls in suits to cancel patents, and that the discovery of the mineral character of the land subsequent to the inception of the right does not give the government the right to cancel a patent. The difference between those cases and the present is plain. This is not a suit to cancel a patent or an equitable title. The suit simply involves the question of the right of the government through the Commissioner of the General Land Office to determine whether the lands are of a character subjecting them

to plaintiff's claim. Until that question is decided, as we have already stated, the applicant as against the government acquires no title in the property, legal or equitable. This is not only established by authority but is justified by experience. The right to select indemnity lands in lieu of agricultural lands lost which empowers the selector to range over a whole state in search of lieu lands has been the agency by means of which great frauds have been perpetrated upon the government. What is "known" about lands some years prior to the time when that knowledge becomes determinative of a right is a difficult field of inquiry. The showing at the time of the filing in the local land office is made wholly by the applicant. It is a paper showing. So far as the government is concerned it is an ex parte proceeding. The selector is entitled to agricultural lands and not to mineral lands. The Commissioner of the General Land Office in the exercise of his jurisdiction to determine whether the lands applied for are such as the applicant is entitled to under the law may not only make such inquiry through agents as he sees fit, but if need be, he may make such exploration as is necessary to determine the question upon which he is asked to pass. This is the only way in which the government can be protected against grave frauds in the administration of the public land laws. The power and duty of the Commissioner to determine whether the land is mineral is not dependent on whether some private party has filed a contest. His jurisdiction to protect the United States is certainly as obligatory as to protect the private rights of contestants.

The decree of the District Court is reversed with directions to the trial court to enter a decree in favor of the plaintiff in accordance with the prayer of the bill, and proceed with the cause.

Filed January 6, 1920.

(*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1919.

Tuesday, January 6, 1920.

No. 5334.

UNITED STATES OF AMERICA, Appellant,

vs.

H. S. RIDGELY, GREYBULL REFINING COMPANY, THE MIDWEST REFINING COMPANY, and the STATE OF WYOMING.

Appeal from the District Court of the United States for the District of Wyoming.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming, and was argued by counsel,

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a decree in favor of the plaintiff in accordance with the prayer of the bill of complaint, and proceed with the cause.

January 6, 1920.

(*Petition for Appeal from the Circuit Court of Appeals for the Eighth Circuit to the Supreme Court of the United States.*)

THE STATE OF WYOMING, H. S. RIDGELY, and THE MIDWEST REFINING COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

The above mentioned appellants, the State of Wyoming, H. S. Ridgely and The Midwest Refining Company, jointly and severally respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit and that a decree has therein been rendered heretofore, to-wit, on the 6th day of January, A. D. 1920, reversing the decree of the District Court of the United States for the District of Wyoming; that the matter in controversy in said suit exceeds Five thousand dollars exclusive of interest and costs; that this cause is one prosecuted by the United States of America as plaintiff against these appellants as defendants, having been originally brought by the United States of America in the United States District Court for the District of Wyoming; that the cause arises under the statutes of the United States; that this cause is one in which the United States Circuit Court of Appeals for the Eighth Circuit has not final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellants, and each of them, jointly and severally pray that an appeal be allowed them in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

WILLIAM L. WALLS,
Attorney General of the State of Wyoming.
HERBERT V. LACEY,
JOHN W. LACEY,
Solicitors and of Counsel for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 26, 1920.

(Assignment of Errors on Appeal to Supreme Court U. S.)

THE STATE OF WYOMING, H. S. KINSLEY, and THE MIDWEST REFINING COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

The appellants in the above entitled cause in connection with their petition for appeal herein present and file herewith their assignment of errors as to which matters and things they jointly and severally say that the decree entered herein heretofore, to-wit, on the tenth day of January, A. D. 1920, is erroneous, to-wit:

1. The lands in controversy were lands of equal acreage selected by the State of Wyoming on April 4, 1912, in lieu of lands owned by the State in Section 36, Township 33 North of Range 67 West of the Sixth Principal Meridian in the State of Wyoming.

Said lieu lands were surveyed, agricultural, unreserved public lands of the United States at the time when Wyoming was admitted as a State July 10, 1890, and by such admission became the property of the State of Wyoming for the support of common schools, and so remained to the time of the selection by the State of the lands in controversy.

On February 22, 1897, by proclamation of the President of the United States the lieu lands were included in a forest reservation.

At the time of their selection, the lands in controversy were unappropriated, surveyed, public lands of the United States within the State of Wyoming, which had not been classified as mineral lands, and were not in anywise known to be mineral lands.

The State of Wyoming on April 14, 1913, relinquished to the United States said lieu lands, and in lieu thereof selected the lands in controversy.

In making such relinquishment and selection the State of Wyoming acted in entire good faith and complied with all statutes and rules and regulations of the Land Department then existing.

No discovery of mineral in said lands was made until the year 1916, when oil was discovered therein.

Therefore the United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the lands in controversy are the property of the United States.

2. The United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the lieu lands at the time when they were relinquished by the State of Wyoming were lands that had been "lost" to the State of Wyoming.

3. In construing the expression "not mineral in character" as contained in Section 2275 of the Revised Statutes of the United States providing for the selection of lieu lands, being the statute under which the selection in controversy was made, the Circuit Court of

Appeals for the Eighth Circuit erred in finding that said expression "not mineral in character" refers to the inherent character of the land, and erred in not finding that the said expression refers only to the known character of the land to be selected.

4. The United States Circuit Court of Appeals for the Eighth Circuit erred in fixing the time when the Land Department rendered its decision upon the selection in controversy as the point of time at which the then known conditions of the selected lands determine the mineral or non-mineral character of the lands for purposes affecting the validity of the selection.

5. The United States Circuit Court of Appeals for the Eighth Circuit erred in not fixing the time when the State of Wyoming relinquished the base lands which were relinquished by it and selected the lands in controversy, as the point of time at which the then known existing conditions determine the mineral or non-mineral character of the lands selected for purposes affecting the validity of the selection.

6. Upon the facts as conceded by the parties and shown without conflict in the evidence, and determined by the United States District Court for the District of Wyoming and by the United States Circuit Court of Appeals for the Eighth Circuit, said United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the lands in controversy are the lands of the United States, and erred in failing to find that the said lands are the property of the State of Wyoming, subject to leasehold rights in the other appellants.

7. Upon the facts conceded by the parties, and shown by the evidence without conflict, and found by the United States District Court for the District of Wyoming and by the United States Circuit Court of Appeals for the Eighth Circuit, the said United States Circuit Court of Appeals for the Eighth Circuit erred in failing to find that the rights of the State of Wyoming under its selection attached and took effect at the point of time when the State had done all that was incumbent upon it to do in the premises, and erred in finding that said rights of the State of Wyoming under its said selection were postponed to the time when the facts showing such performance by the State might be ascertained and declared by the land officers.

8. Upon the facts conceded by the parties and shown without conflict by the evidence, and found by the United States District Court for the District of Wyoming and by the United States Circuit Court of Appeals for the Eighth Circuit, said United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the selection of the lands in controversy was subject to approval by the Land Department of the United States or by the Secretary of the Interior in some other sense than that said Land Department and said Secretary of the Interior were vested with the right and duty to determine the facts as they existed at the time of the selection of the lands in controversy by the State of Wyoming, and from said facts, so determined, ascertain and determine the validity of the selection.

9. The United States Circuit Court of Appeals for the Eighth Circuit erred in failing to find that the only power or duty of the Land Department of the United States and of the Secretary of the Interior in relation to the selection of the lands in controversy was to determine the rights of the parties solely upon the facts as they existed at the time of the selection of said lands by the State of Wyoming.

10. The United States Circuit Court of Appeals for the Eighth Circuit erred in failing to find that the only mineral lands excepted as such from the right of the State of Wyoming to select under Section 2276 of the Revised Statutes of the United States were lands then known to be mineral.

11. The United States Circuit Court of Appeals for the Eighth Circuit erred in giving conclusive force and effect to mineral discoveries and developments made subsequent to the selection by the State of Wyoming of the lands in controversy, notwithstanding the fact that said selected lands were not known to be mineral lands at the time of the selection.

12. The United States Circuit Court of Appeals for the Eighth Circuit erred in not affirming the judgment and decree of the United States District Court for the District of Wyoming.

Wherefore, the appellants, and each of them, pray that the said judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit be in all things reversed.

WILLIAM L. WALLS,
Attorney General of the State of Wyoming.
HERBERT V. LACEY,
JOHN W. LACEY,
Solicitors and of Counsel for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 26, 1920.

(*Stipulation as to Amount of Supersedeas Bond on Appeal.*)

THE STATE OF WYOMING, H. S. RIDGELY, and THE MIDWEST REFINING COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

It is hereby agreed and stipulated by and between the United States of America, acting by and through Charles L. Rigdon, United States District Attorney for the District of Wyoming, and David J. Howell, Assistant United States Attorney for the District of Wyoming, solicitors and counsel for the United States of America, and The State of Wyoming, H. S. Ridgely and The Midwest Refining Company, acting by and through William L. Walls, Attorney General of the State of Wyoming, and Herbert V. Lacey and John W.

Lacey, their solicitors and counsel, that the supersedeas bond to be given by the appellants upon the appeal in the above entitled cause from the United States Circuit Court of Appeals for the Eighth Circuit to the Supreme Court of the United States shall be fixed in the sum of Ten thousand Dollars ($10,000.00).

CHARLES L. RIGDON,
United States District Attorney
for the District of Wyoming;
DAVID J. HOWELL,
Assistant United States District Attorney
for the District of Wyoming,
Solicitors and of Counsel for Appellee.
WILLIAM L. WALLS,
Attorney General of the State of Wyoming,
HERBERT V. LACEY,
JOHN W. LACEY,
Solicitors and of Counsel for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 26, 1920.

(Bond on Appeal to Supreme Court U. S.)

THE STATE OF WYOMING, H. S. RIDGELY, and THE MIDWEST REFINING COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Know All Men by These Presents, that the undersigned United States Fidelity & Guaranty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do business as surety and to become surety upon bonds such as this instrument, are held and firmly bound unto United States of America in the sum of Ten thousand Dollars, to be paid to the said United States of America, for the payment of which we bind ourselves, our successors and assigns firmly by these presents.

Witness the seal of said Company and dated this 26th day of Jan'y, A. D. 1920.

Whereas, the appellants in the above entitled cause have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Eighth Circuit heretofore, to-wit, on the sixth day of January, A. D. 1920.

Now, Therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise to remain in full force and virtue.

UNITED STATES FIDELITY &
GUARANTY COMPANY,
By E. R. NIEHAUS,
Attorney in Fact.

The foregoing bond is approved this 26th day of January, A. D. 1920.

WILLIAM C. HOOK,
United States Circuit Judge, Eighth Circuit.

(General Power of Attorney attached to original Bond.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 26, 1920.

(*Order Allowing Appeal to Supreme Court U. S. and Fixing Bond.*)

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and the same is hereby allowed.

It is further ordered that the bond on said appeal to operate also as a supersedeas be and the same is hereby fixed at the sum of ten thousand dollars, upon the giving of which bond, with the approval of one of the Circuit Judges for the Eighth Circuit, further proceedings in said cause shall be stayed pending the appeal in the Supreme Court of the United States.

Dated this 26th day of January, A. D. 1920.

WILLIAM C. HOOK,
United States Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 26, 1920.

United States Circuit Court of Appeals, Eighth Circuit.

The United States of America, Eighth Circuit.

THE STATE OF WYOMING, H. S. RIDGELY, and THE MIDWEST REFINING COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

To United States of America:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, sixty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the State of Wyoming, H. S. Ridgely and The Midwest Re-

fining Company are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William C. Hook, Judge of the United States Circuit Court of Appeals for the Eighth Circuit this 26th day of January, A. D. 1920.

WILLIAM C. HOOK,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service of the within citation is acknowledged this 29th day of Jan'y, A. D. 1920.

____ ____,
Special Assistant to the Attorney General,
C. L. RIGDON,
United States Attorney for the District of Wyoming, Solicitors and of Counsel for Appellee.

[Endorsed:] No. 5334. United States Circuit Court of Appeals, Eighth Circuit. The State of Wyoming, H. S. Ridgely and The Midwest Refining Company, Appellants, vs. United States of America, Appellee. Citation. Filed Jan. 31, 1920. E. E. Koch, Clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Wyoming, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the United States of America was Appellant and H. S. Ridgely, et al., were Appellees, No. 5334, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

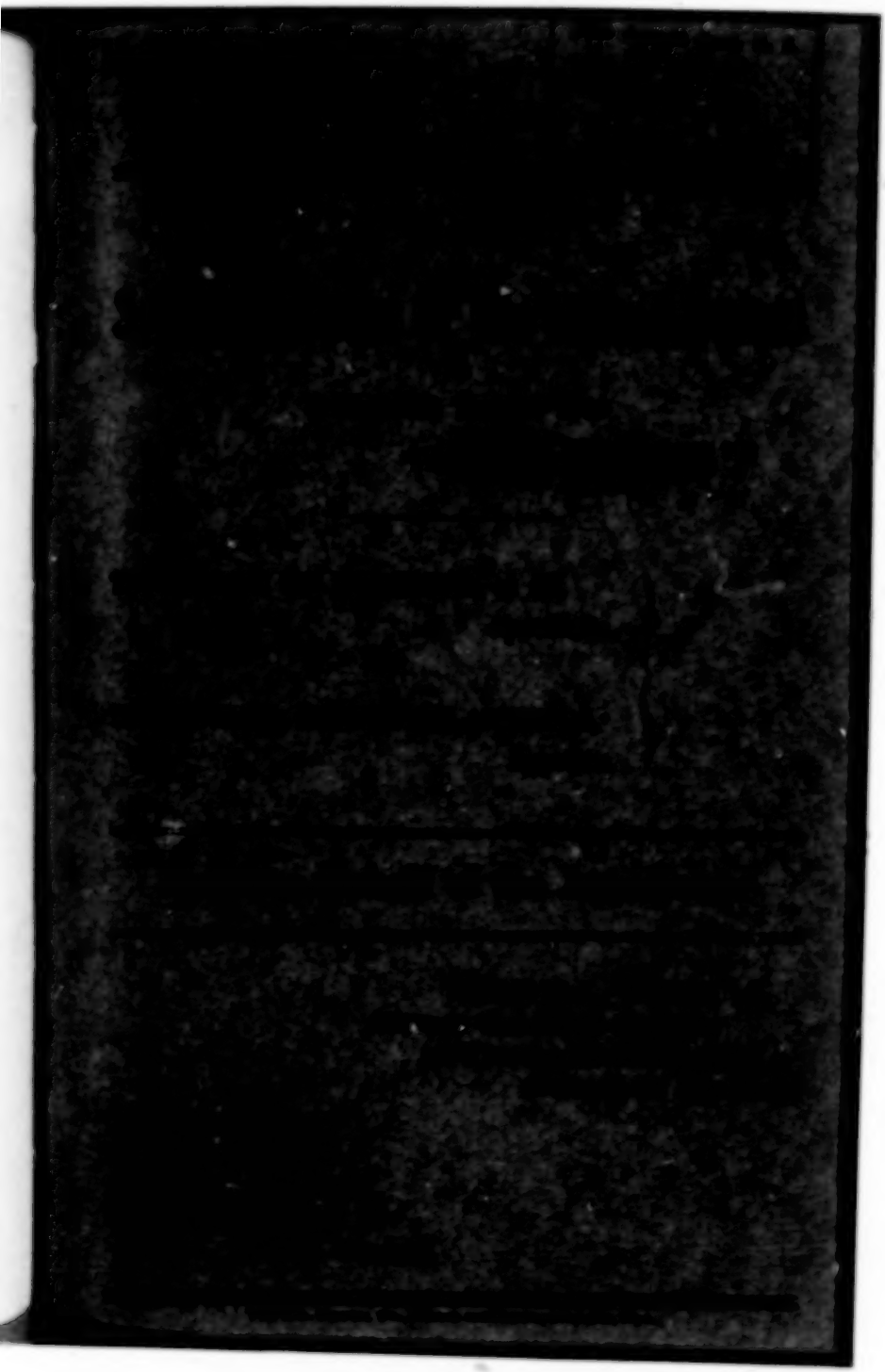
In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this eleventh day of February, A. D. 1920.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 27,497. U. S. Circuit Court Appeals, 8th Circuit. Term No. 742. The State of Wyoming, H. S. Ridgely, and The Midwest Refining Company, appellants, vs. The United States of America. Filed February 24th, 1920. File No. 27,497.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

No. 742

THE STATE OF WYOMING, *et al*,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Brief on Behalf of the Appellants

WILLIAM L. WALLS,
Attorney General of the State of Wyoming, Solicitor and of Counsel for Appellants

D. A. PRESTON,
H. S. RIDGELY,
HERBERT V. LACEY,
JOHN W. LACEY,
Of Counsel.

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IN THE

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OCTOBER TERM, 1919

No. 742

THE STATE OF WYOMING, *et al*,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Brief on Behalf of the Appellants

I.

Statement of the Case.

This is a suit by the United States of America seeking to quiet in the United States the title to eighty acres of land claimed by the State of Wyoming as school lands and to require an accounting of profits.

A. The Base Lands.

When Wyoming was admitted as a State July 10, 1890, it acquired title to the South-half of the South-east Quarter of Section 36, Township 53 North, Range 87 West of the Sixth Principal Meridian "for the support of common schools." These lands in Section 36 will be hereinafter spoken of as the "base lands."

In 1897, the President included said base lands in the Big Horn Forest Reserve.

B. Selection of the Lands in Controversy.

In April, 1912, the State of Wyoming relinquished the base lands to the United States, selecting in lieu of them the lands in controversy. The lands selected were not classified as mineral lands, nor known to be mineral in character at the time of their selection. About two years later the President withdrew from entry a large body of lands, including the lands in controversy. And about two years after the withdrawal and prior to final action upon the selection by the Land Department, oil in paying quantities was discovered in the selected lands. The Secretary rejected the selection, and this terminated finally the proceedings in the Land Department.

This final rejection was based upon the withdrawal and the discovery of oil in the selected lands, both occurring some years after the selection by the State. In the final action rejecting the selection, the Secretary of the Interior uses this language:

> "Counsel have requested that specific findings be made to the sufficiency and due regularity of the State's application, as to the asserted fact that the land was not known to possess mineral value at the date of filing and as to the good faith of the State and its ignorance of the oil deposits since developed, when it applied. Findings with respect to these matters are sought because it is believed that litigation will ensue and that such findings would be of avail on behalf of the State. The Department must decline to undertake an adjudication of the questions suggested."

Printed Record, page 56, lines 34 to 43.

There was no finding of fact by the Land Department contrary to any fact here asserted by the appellants.

C. The Bill of Complaint in this Case.

Within a year after the final decision by the Department, the United States brought this suit. The bill alleges that the State selected the land in controversy April 4, 1912, and that the selection was rejected August 17, 1916. (Record page 2, lines 17 to 35.) That on May 6, 1914, the President withdrew the lands from entry, (page 2, lines 7 to 15,) that about June 24, 1916, certain defendants leased the lands from the State of Wyoming for the purpose of drilling for oil, and have since extracted a large quantity of oil from the lands (page 2, line 45, to page 3, line 7.)

D. The Answers.

The answers set up the title and rights acquired by the State of Wyoming through the selection of the lands in controversy in lieu of school lands which had been granted to and vested in the State by the Act of Admission of July 10, 1890 (26 Statutes 222). (Record page 10, line 1, to page 18, line 18; also page 20, line 30, to page 28, line 42.)

E. Agreed Facts.

On the trial of the cause, it was agreed:

1. That the base lands were surveyed, agricultural, non-mineral, public lands of the United States at the time when Wyoming was admitted as a State.

(NOTE. It resulted from these facts that the base lands vested in the State for the use of common schools by the Act of Admission.)

2. That the base lands were still the property of the State of Wyoming when the State selected the lands in controversy and relinquished the base lands to the United States.

3. That the lands in controversy at the time of their selection had not been classified as mineral lands, and were unappropriated, surveyed, public lands of the United States within the State of Wyoming.

4. That in making its selection and relinquishment, the State of Wyoming complied with all laws and rules and regulations governing the same. (Record page 30, line 16, to page 31, line 12.)

F. Other Facts Proven.

Besides agreeing to the above facts, the United States introduced in evidence a certified copy of the records of the United States Land Office showing the relinquishment of the base lands to the United States and the selection of the lands in controversy by the State of Wyoming. (Record page 31, line 13, to page 61, line 20.)

The record so introduced in evidence by the Government contains an affidavit that the selected lands were non-mineral at the time of their selection. (Record page 33, line 24, to page 34, line 18.)

In addition to the agreed statement that the lands had not been classed as mineral lands and the non-mineral affidavit so introduced in evidence by the Government, the defendants, by two witnesses, proved the non-mineral character of the lands at the time of their selection. (Record page 65, lines 6 to 19.)

The defendants also introduced in evidence the proclamation of the President of February 22, 1897, creating the Big Horn Forest Reserve, and including in that Reserve the base lands then and thereafter up to the time of their relinquishment, the property of the State of Wyoming. (Record page 62, line 1, to page 65, line 5.)

There is nothing in the record in conflict with any of the agreed or proven facts above stated.

The only controverted question is entirely a question of law.

G. The Decrees by the Lower Courts.

The District Court dismissed the bill on the merits. (Record page 66, lines 6 to 26.)

The Circuit Court of Appeals for the Eighth Circuit reversed the decree of the District Court, with directions to the trial court "to enter a decree in favor of the plaintiff in accordance with the prayer of the bill." (Record page 83, line 29, to page 84, line 9.)

The opinion of the Circuit Court of Appeals is in the record. (Record page 79.)

II.

Assignment of Errors.

The appellants at the proper time filed an assignment of errors, therein stating the grounds for the contention that the decision of the United States Circuit Court of Appeals for the Eighth Circuit is erroneous. We here assign as errors the same matters. They are as follows:

"1. The lands in controversy were lands of equal acreage selected by the State of Wyoming on April 4, 1912, in lieu of lands owned by the State in Section 36, Township 33 North of Range 87 West of the Sixth Principal Meridian in the State of Wyoming.

"Said base lands were surveyed, agricultural, non-mineral public lands of the United States at the time when Wyoming was admitted as a State, July 10, 1890, and by such admission became the property of the State of Wyoming for the support of common schools, and so remained to the time of the selection by the State of the lands in controversy.

"On February 22, 1897, by proclamation of the President of the United States the base lands were included in a forest reservation.

"At the time of their selection, the lands in controversy were unappropriated, surveyed, public lands of the United States within the State of Wyoming, which had not been classified as mineral lands, and were not in anywise known to be mineral lands.

"The State of Wyoming on April 14th, 1912, relinquished to the United States said base lands, and in lieu thereof selected the lands in controversy.

"In making such relinquishment and selection the State of Wyoming acted in entire good faith and complied with all statutes and rules and regulations of the Land Department then existing.

"No discovery of mineral in said lands was made until the year 1916, when oil was discovered therein.

"Therefore the United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the lands in controversy are the property of the United States.

"2. The United States Circuit Court of Appeals for the Eighth Circuit erred in finding

that the base lands at the time when they were relinquished by the State of Wyoming were lands that had been 'lost' to the State of Wyoming.

"3. In construing the expression 'not mineral in character' as contained in Section 2276 of the Revised Statutes of the United States providing for the selection of lieu lands, being the statute under which the selection in controversy was made, the Circuit Court of Appeals for the Eighth Circuit erred in finding that said expression 'not mineral in character' refers to the inherent character of the land, and erred in not finding that the said expression refers only to the known character of the land to be selected.

"4. The United States Circuit Court of Appeals for the Eighth Circuit erred in fixing the time when the Land Department rendered its decision upon the selection in controversy as the point of time at which the then known conditions of the selected lands determine the mineral or non-mineral character of the lands for purposes affecting the validity of the selection.

"5. The United States Circuit Court of Appeals for the Eighth Circuit erred in not fixing the time when the State of Wyoming relinquished the base lands which were relinquished by it and selected the lands in controversy, as the point of time at which the then known existing conditions determine the mineral or non-mineral character of the lands selected for purposes affecting the validity of the selection.

"6. Upon the facts as conceded by the parties and shown without conflict in the evidence, and determined by the United States District Court for the District of Wyoming and by the United States Circuit Court of Appeals for the Eighth Circuit, said United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the lands in controversy are the lands of the United States, and erred in failing to find that the

said lands are the property of the State of Wyoming, subject to leasehold rights in the other appellants.

"7. Upon the facts conceded by the parties, and shown by the evidence without conflict, and found by the United States District Court for the District of Wyoming and by the United States Circuit Court of Appeals for the Eighth Circuit, the said United States Circuit Court of Appeals for the Eighth Circuit erred in failing to find that the rights of the State of Wyoming under its selection attached and took effect at the point of time when the State had done all that was incumbent upon it to do in the premises, and erred in finding that said rights of the State of Wyoming under its said selection were postponed to the time when the facts showing such performance by the State might be ascertained and declared by the land officers.

"8. Upon the facts conceded by the parties, and shown without conflict by the evidence, and found by the United States District Court for the District of Wyoming and by the United States Circuit Court of Appeals for the Eighth Circuit, said United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the selection of the lands in controversy was subject to approval by the Land Department of the United States or by the Secretary of the Interior in some other sense than that said Land Department and said Secretary of the Interior were vested with the right and duty to determine the facts as they existed at the time of the selection of the lands in controversy by the State of Wyoming, and from said facts, so determined, ascertain and determine the validity of the selection.

"9. The United States Circuit Court of Appeals for the Eighth Circuit erred in failing to find that the only power or duty of the Land Department of the United States and of the

Secretary of the Interior in relation to the selection of the lands in controversy was to determine the rights of the parties solely upon the facts as they existed at the time of the selection of said lands by the State of Wyoming.

"10. The United States Circuit Court of Appeals for the Eighth Circuit erred in failing to find that the only mineral lands excepted as such from the right of the State of Wyoming to select under Section 2276 of the Revised Statutes of the United States were lands then known to be mineral.

"11. The United States Circuit Court of Appeals for the Eighth Circuit erred in giving conclusive force and effect to mineral discoveries and developments made subsequent to the selection by the State of Wyoming of the lands in controversy, notwithstanding the fact that said selected lands were not known to be mineral lands at the time of the selection.

"12. The United States Circuit Court of Appeals for the Eighth Circuit erred in not affirming the judgment and decree of the United States District Court for the District of Wyoming."

(Page 85, line 11, to page 87, line 20.)

III.

Brief of the Argument.

As shown in the statement of facts, no question of fact is in dispute in this cause. The only controverted questions are questions of law.

The appellants contend that as matter of law rights in the lands in controversy under the undisputed facts vested in the State of Wyoming at the time of the selection of said lands, and that the discovery of mineral values in the lands years after their selection

did not divest the State of those rights. To state it in another form, the appellants contend:

1st. That since the State in making its selection under Sections 2275 and 2276 of the Revised Statutes of the United States complied with all the terms and conditions necessary to entitle the State to receive the selected lands, it acquired a vested interest in the selected lands at that point of time. The State's compliance with Sections 2275 and 2276, supra, (a) relinquished to the United States the base lands then owned by the State of Wyoming for the use of schools, but which while so owned by the State had been included in a forest reserve by proclamation of the President; and (b) vested in the State rights in the selected lands—the lands here in controversy—which were then unappropriated, surveyed, public lands, not mineral in character, within the State of Wyoming.

2nd. That questions respecting the mineral or non-mineral character of the selected lands as affecting the rights acquired by the selection are to be determined by the conditions existing at the time when all requirements necessary to obtaining title were complied with by the State and that no change in such conditions subsequently occurring can affect the State's rights.

The decision of the District Court sustains these contentions of the appellants. The decision of the Circuit Court of Appeals for the Eighth Circuit denies that any rights were acquired by the State, and denies that the State has any rights in the lands.

For convenience, we have printed in an appendix to this brief the section of the Act of Congress admitting Wyoming as a State, under which the State acquired the base lands, and also Sections 2275 and 2276 of the Revised Statutes of the United States, as

amended by the Act of February 28, 1891, (26 Statutes 796, 797) under which the State of Wyoming relinquished the base lands to the United States and selected the lands in controversy in lieu of the base lands.

1. Sections 2275 and 2276 R. S. Gave the State the Right to Relinquish the Base Lands and select the Lands in Controversy in Exchange.

In the case of California v. Deseret Water etc. Co., 243 U. S. 415, the question was whether certain lands in Section 16 were the sole property of the State of California, or in equity belonged to the United States. If the lands were the sole property of California, the plaintiffs in that case were authorized to condemn them under eminent domain proceedings. If the lands were the property of the United States, condemnantion could not be had.

The lands in section sixteen had passed to the State of California "by virtue of the Federal grant for school purposes." After the title so vested in the State, the Mono Forest Reserve was established by proclamation of the President. This reservation included Section sixteen within its boundaries. All but forty acres of Section sixteen were thereafter offered by the State as bases for lieu selections. These lieu selections had not been approved by the Secretary of the Interior. On the contrary they were still pending in the General Land Office even when this Court decided the case.

It was, of course, prior to any approval of the selection by the Secretary that the Deseret Water etc. Co. brought its condemnation suit to appropriate the land in Section sixteen. This Court in that case construes Sections 2275 and 2276 upon the point in-

volved in the case at bar. The Court distinguishes between the provisions of those sections which authorized the State to select other lands to supply deficiencies where lands failed to vest in the State and those provisions which authorized an exchange between the State and the Government under the circumstances involved in the case at bar, that is to say, where the base lands had actually vested in the State but were afterwards included in a forest reservation.

That case came to this Court on error to the Supreme Court of California. The Supreme Court of California in its decision of the case held that the base lands still remained the property of the State, and therefore that under the California statutes the Water Company could appropriate the lands by eminent domain proceedings.

The contention *contra* was that because the State after the inclusion of the base lands in a forest reserve had, under Sections 2275 and 2276, selected other lands in lieu of such base lands; the base lands in equity belonged to the United States, and therefore could not be condemned for the uses of the Water Company. This Court adopted the latter contention and reversed the decision of the Supreme Court of California.

2. The Offer to Exchange was made by the Government.

Upon its admission to the Union the State of Wyoming received full title to the base lands involved in this case. Some years thereafter Presidential Proclamation surrounded these base lands, (which were still owned by the State,) by a forest reserve. It was desirable, from the standpoint of the Government,

that the State should yield the base lands in order that the integrity of the forest reservation might be preserved. At the same time the creation of the forest reserve isolated the base lands, and hence made them less desirable for the State. California v. Deseret Water Company, supra, at page 420. Roughton v. Knight, 219 U. S. 537, at page 546.

For these reasons the Government by Sections 2275 and 2276 of the Revised Statutes made to the State the following offer:

> "Other lands of equal acreage are * * hereby appropriated and granted, and may be selected by said State * * where Sections sixteen and thirty-six are * * included within any * * reservation." R. S. Sec. 2275.
>
> "The lands appropriated by the preceding section shall be selected from any unappropriated surveyed public lands, not mineral in character, within the State." Sec. 2276.

And the proviso in Section 2275 added to the Government's offer the following stipulation:

> "The selection of such lands in lieu thereof by said State * * shall be a waiver of its right to said sections." sixteen or thirty-six, so included in the forest reserve.

This was an offer by the Government for the exchange of the lands. Roughton v. Knight, 219 U. S. 537, 546. All of the terms of the offer were fixed by the Government. Not only did the Government specify by general description the lands which it offered in the exchange and the lands which it would receive as an equivalent, but by its statutes and rules and regulations the Government fixed in all its details

the manner by which this offer might be accepted by the State. The State had nothing whatever to do with fixing the terms of the offer. That was entirely assumed by the Government, and it was left to the State only to accept or reject, and if it desired to accept, it could not choose its own method or form or any other matter in relation to it. It could merely surrender to the Government such lands as were described in the Government's offer, and select lands of equal acreage from those tendered by the Government, and in doing so follow methods and forms prescribed by the Government.

3. The State Accepted the Government's Offer.

The State of Wyoming made no offer whatever to the Government. Not a single word was added by the State to the offer made by the Government. On the contrary, the agreed facts and the evidence show that the State accepted the offer of the Government exactly as made.

First. The State surrendered lands which the Government's offer asked it to surrender for the preservation of the integrity of the forest reserve. The lands so surrendered filled every requirement of the Government's offer.

Second. In making the surrender of the base lands and in selecting the lands in controversy in lieu of the base lands, the agreed facts show that the State complied with every requirement of the Government's offer, including the requirements of the rules and regulations of the Land Department.

Third. The agreed facts and the evidence show, without conflict, that the lands selected were unappropriated, surveyed public lands, not mineral in

character, within the State, thus meeting the Government's offer as to the lands which the State was to receive in exchange for the base lands which it surrendered. Having so complied in full with the statutes and rules and regulations constituting the Government's offer, the State went into possession of the lands in controversy, and is now in possession upon that exchange. When an acceptance so completely fills the conditions of an offer, no counter acceptance is needed to complete the contract.

We have said that the lands in controversy were not mineral in character at the time of their selection by the State. Upon this point the proof is,

1st. The agreed fact that the lands had not been classified as mineral lands at the time of their selection. (Page 30, lines 29 to 32.)

2nd. The Government introduced in evidence the selection proceedings of the Land Department, and with those proceedings an affidavit made at the time showing that the lands were not mineral. (Page 33, line 24, to page 34, line 18.)

3rd. It was proven at the trial by two witnesses that the lands in controversy were not known to be mineral at the time of their selection. (Page 65, lines 6 to 14.)

4th. There was no evidence that the land was known to be mineral at the time of the selection.

It is clear, without conflict, that the land in controversy was not at the time of the selection "mineral in character" within the meaning of those words as often defined by this Court. It was not then "known to be mineral."

Deffeback v. Hawke, 115 U. S. 392, 404
Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 327.

Davis's Administrator v. Weibbold, 139 U. S. 507, 518.
Shaw v. Kellogg, 170 U. S. 312, 332.
Moran v. Horsky, 178 U. S. 205, 209.
United States v. Plowman, 216 U. S. 372, 374.
Diamond Coal and Coke Co. v. United States, 233 U. S. 236, 240.

It will be noted that this case is not like the cases where the Government has granted large areas of lieu land as donations to or in aid of railroad companies, or similar donations.

In such cases the railroads do not surrender or convey any lands to the Government in exchange for lands received by them, nor are they expected to do so. It is a donation pure and simple, to be strictly construed in favor of the Government; and of course the terms of the donation itself must control. And it is usual as a part of those terms to provide that any selection made of lieu lands shall be "subject to the approval of the Secretary of the Interior," or "shall be made with the approval of the Secretary of the Interior," or similar expressions. Since the railroads in such cases give up nothing at the time of the selection, the very selection itself is made a joint act of the railroad, or the officer acting on its behalf, and the Secretary of the Interior.

4. An Exchange of Lands for Lands between a Sovereign Nation and a Sovereign State.

Many differences between the statutes donating lieu lands to the railroads on the one hand, and the statute here involved on the other hand, might be pointed out.

1st. In the case at bar the State, as required by the statute, at the time of the selection surrendered for

the lands selected an equal acreage of other lands. Under the statutes donating lieu lands to Railroad Companies the Railroad Company surrenders no lands, and the statutes provide for no surrender of lands or any other thing by the Railroad Company.

2nd. In the cases of railroad lieu land donations one of the conditions usually specifically mentioned in the statute making the donation is that the selection shall be made subject to the approval of the Secretary of the Interior. In the case at bar no such requirement is made.

3rd. In the railroad indemnity land grants there are no provisions that the selection by the Railroad should have any effect whatever before approval of the selection by the Secretary of the Interior. In the case at bar the statute provides that "the selection of such lands in lieu thereof by said State shall be a waiver of its right" to the base lands. And, as we have seen from the case of California v. Deseret Water Company, supra, and as the language of the statute itself provides, it is the selection by the State, with nothing whatever done by the Land Department, or by any one else, that operates to surrender the base lands. It would seem strange that the "selection by the State" should be held a selection such as would transfer equitable title to the United States of the base lands, and at the same time that it was not a selection in fact, and gave no rights to the State in the selected land because not approved by the Secretary of the Interior. The statutes are so different in their purpose and in their terms and provisions and in the circumstances under which they are applied as to leave little, if any, room for construing them alike. Each must be construed upon its own provisions.

5. By Complying with the Statute the State acquired Equitable Title to the Lands in Controversy.

"It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership."

Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 432.
Carroll v. Safford, 3 How. 441.
Lytle, et al. v. The State of Arkansas, et al., 9 How. 314.
Lessee of French v. Spencer, 21 How. 228.
Witherspoon v. Duncan, 4 Wall. 210.
Stark v. Starrs, 6 Wall. 402, 418.
Barney v. Dolph, 97 U. S. 652, 656.

"The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location."

Wirth v. Branson, 98 U. S. 118, 121.
Simmons v. Wagner, 101 U. S. 260.

Hedrick v. Atchison, Topeka & Santa Fe R. R., 167 U. S. 673, 679.
United States v. Detroit Lumber Co., 200 U. S. 321, 337.
El Paso Brick Co. v. McKnight, 233 U. S. 250, 256.

6. Title not Affected by Discoveries of Minerals Afterwards.

"A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual 'known mines' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed."

Colorado Coal Co. v. United States, 123 U. S. 307, 328.
Davis's Administrator v. Weibbold, 139 U. S. 507, 524.

Similar Grants in Lieu of Rights Under Mexican Claims.

"The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others.

The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, preemption or townsite entries, the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral."

Shaw v. Kellogg, 170 U. S. 312, 332.

7. The Grant is in Praesenti.

The language of the Act clearly shows that the grant is *in praesenti*. The words of the statute are "other lands of equal acreage *are also hereby appropriated and granted.*".

In the case of Rutherford v. Greene's Heirs, 2 Wheaton 196, the Supreme Court construed an act of the Legislature of the State of North Carolina, and in so doing used the following language:

"The 10th section enacts, 'that 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns,

within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer.' This is the foundation of the title of the appellees.

"On the part of the appellant, it is contended, that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the state, nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not, indeed, of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers.

" 'Be it enacted, that 25,000 acres of land shall be allotted for and given to Major General Nathaniel Greene.' Persons had been appointed in a previous section to make particular allotments for individuals, out of this large territory reserved; and the words of this section contain a positive mandate to them to set apart 25,000 acres for General Greene. As the act was to be performed in future, the words directing it are necessarily in the future tense. 'Twenty-five thousand acres of land shall be allotted for and given to Major General Nathaniel Greene.' Given, when? The answer is unavoidable—when they shall be allotted. Given, how? Not by any future act for it is not the practice of legislation to enact, that a law shall be passed by some future legislature—but given by force of this act."

Page 197.

In conclusion the Court in that case uses this language:

"It is clearly and unanimously the opinion of this Court, that the act of 1782 vested a title

in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to that title, and attached it to the land surveyed."

Page 205.

In the case of Lessieur et al., v. Price, 12 Howard 59, the effect of a certain grant to the State of Missouri was considered. That act provided that,

"Four entire sections of land be, and the same are hereby granted to said State, (the state of Missouri,) for the purpose of fixing their seat of government thereon, which said sections shall, under the direction of the legislature of said state, be located, as near as may be, in one body at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States, provided that such locations shall be made prior to the public sale of the lands of the United States surrounding such location.' 3 Stat. at L., 547."

Page 61.

The court in its opinion states the proposition and its conclusion in this way:

"First, it is insisted 'that the location was void because there never was any communication made by any person for the state of Missouri to any officer of the United States having power to grant an application for, or allow any location of, said lands; and that such location should have been entered and recorded in the Registrar's office of the local land district.'

"The land was granted, by the act of 1820; it was a *present grant*, wanting identity to make it

perfect; and the legislature was vested with full power to select, and locate the land; and we need only here say, what was substantially said, by this court, in the case of Rutherford v. Green's Heirs, (2 Wheat., 196,) that the act of 1820 vested a title in the state of Missouri, of four sections; and that the selection made by the state legislature pursuant to the act of Congress, and the notice given of such location to the Surveyor-General, and the Register of the local district where the land lay, gave precision to the title and attached to it the land selected."

Page 76.

In the case of Schulenberg v. Harriman, 21 Wallace 44, the Supreme Court again considered the act granting lands to the State of Missouri construed in the case last above, and reached the same conclusions, first quoting from that case, and then proceeded:

"Numerous other decisions might be cited to the same purport. They establish the conclusion that unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them.

"The rules applicable to private transactions, which regard grants of future application—of lands to be afterwards designated—as mere contracts to convey, and not as actual conveyances, are founded upon the common law, which requires the possibility of present identification of

property to the validity of its transfer. A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires."

Page 62.

In each of the cases from which quotations are made as above in this paragraph, the grant was a donation pure and simple, yet it was construed as a present grant, and title was held to vest from the very moment of the identification of the lands. The Act was held in each case a conveyance as well as a statute.

In the case at bar the language of the statute involved is fully as clear, and the grant is not a donation to the State, but it is an exchange with the State. The reasons for holding that it takes effect as a conveyance at that very moment when the identification is completed by the surrender of the base lands and the selection of other lands instead, are stronger than in the cases last above cited.

8. The Original Grant of School Lands to a State Takes Effect in Praesenti.

It will be remembered that the statute here involved does not require any patent in order to vest in the State the title to the selected lands. In this respect the provisions are not unlike those in relation to the original vesting in the State of sections sixteen and thirty-six for the benefit of public schools.

In the case of Wyoming, as with many of the States, the Federal statute grants to the State sections numbered sixteen and thirty-six of every township of the State for the support of common schools. The grant is *in praesenti*, but all lands otherwise dis-

posed of and all mineral lands are excluded from the grant. For the Wyoming statute see 26 Statutes at Large 222-224.

Under such statutes it is held that unsurveyed lands do not pass until surveyed and the identity of sections sixteen and thirty-six determined.

It is likewise held that in order to be exempt as mineral lands, the lands must have been known to be mineral at the time of the admission of the State in the case of lands already surveyed, and at the time of the completion of the survey in the case of lands not surveyed when the State is admitted.

In every such grant the Land Department is authorized to determine whether lands in sections sixteen and thirty-six were mineral in character, or otherwise, at the time when the grant took effect by the admission or by the survey. Yet this right of the Land Department to determine the character of the lands does not at all prevent the grant from taking effect at the time of the admission or of the survey, as the case might be. The power of the Department is not in any sense a discretion. It is the power to investigate and determine the character of the lands at the time when the State's title vested, in case it ever vested. And the Department so exercised the power. For example, in the case of Rice v. State of California, 24 Land Decisions 14, the Land Department exercised its jurisdiction to determine the character of lands in section thirty-six. But that case followed the prior cases in the Department by holding that title to section thirty-six vests at the date of the survey; that the investigation as to the character of the land must relate to that date, and that the subsequent discovery of mineral would not divest the title.

"It has been repeatedly held that the State's title to school lands under the act of March 3, 1853 (10 Stat., 244), vests at the date of the completion of the survey, and if the land, although in reality mineral, was not then *known* to be mineral, the subsequent discovery of its mineral character would not divest the title which had already passed. (Abraham L. Miner, 9 L. D., 408; Pereira v. Jacks, 15 L. D., 273.)"

Rice v. State of California, 24 Land Decisions 14, 15.
Sherman v. Buick, 93 U. S. 209.
Heydenfeldt v. Daney etc. Mining Co., 93 U. S. 634.

"The rule which the Heydenfeldt Case established has, we understand, been uniformly followed in the land office. After reviewing the cases, Secretary Lamar concluded (December 6, 1887; to Stockslager, Commissioner, 6 L. D. 412, 417) that the school grant 'does not take effect until after survey, and if at that date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the State, and if at that date said sections have been sold or disposed of, the State takes indemnity therefor.' And see, to the same effect, Niven v. California, 6 L. D. 439; Washington v. Kuhn, 24 L. D. 12, 13; California v, Wright, Id. 54, 57; South Dakota v. Riley, 34 L. D. 657, 660; South Dakota v. Thomas, 35 L. D. 171, 173; F. A. Hyde, 37 L. D. 164, 166; to Atty. Gen of Montana, 38 L. D. 247, 250."

United States v. Morrison, 240 U. S. 192, 207.

Such had been from the beginning the construction of the acts granting school lands to the various States. This was true notwithstanding the fact that the original grant was a donation to the

States for school purposes. The construction, nevertheless, had been uniform, as above indicated, that the grant was a present grant and took effect immediately upon the State's admission into the Union if the lands were then surveyed and so identified by the statute. If the lands were not then surveyed, the Act still took effect as a present grant as soon as the lands were surveyed, and thus became identified so that the Act could apply. The vesting of title did not await any approval by the Secretary of the Interior.

Sections 2275 and 2276 of the Revised Statutes were enacted in the light of such construction. They retained the same language of present grant. The great public purpose, common school education of the future citizen, beneficial to the United States as well as to the State and its people, was in the new grant exactly as in the original one.

In addition to all that, the new act, so far as involved in the case at bar, was not in any sense a donation to the State. It was an exchange by the Government with the State of lands for lands, acre for acre, and an exchange which, in addition to the great public purpose, was directly and specially beneficial to the United States in preserving the integrity of its forest reserve. If identification by the mere act of survey of the unsurveyed lands, without more, immediately vested title in the State in sections sixteen and thirty-six as donations, how much more did the identification by selection and surrender of base lands immediately vest in the State the title to the selected lands. If subsequent discovery of mineral in land so identified by a mere survey was without effect upon the State's title, how much more certainly would there be no effect upon the State's title when minerals were discovered subsequent to an identification of the lands

accomplished by their selection and the surrender of base lands in accordance with the terms of the statute. And that this must be the effect seems to us clear when we remember that Congress must have known the construction given to the original grant, as a grant *in praesenti* and operative as above indicated, and with that knowledge included in the amendment of Section 2275 the provision that the "selection of such lands in lieu thereof by said State shall be a waiver of its right" to the lands included in the forest reserve in lieu of which the selection is made.

> "In the case of James K. Jacks, et al., (7 L. D. 570), where there was a homestead entry, it was held that 'the subsequent discovery of coal, on a small portion of the land, after the final entry, cannot affect the right of the purchaser, who had completed his entry."
>
> "See also Harnish v. Wallace (13 L. D. 108).
>
> "From these authorities it is evident that the question of the character of the land must be determined, in the case of a homestead entry, as of the date when the final entry is made, and under the conditions then existing."
>
> Rea, et al. v. Stephenson, 15 Land Decisions 37, 38.

9. Comparison of the State Lieu Land Act here Involved, with the Forest Reserve Lieu Land Act of June 4, 1897.

Owing to certain analogies between the State Lieu Land Act here involved, (Sections 2275 and 2276, R. S.), and the Forest Reserve Lieu Land Act, of June 4, 1897, (30 Stats. 36), we here give, for the purpose of comparison, the language of the latter act, viz:

> "That in cases in which a tract covered by an unperfected bona fide claim or by a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such case for making the entry of record, or issuing the patent to cover the tract selected."

In defining the purpose and meaning of the latter act, this court in Roughton v. Knight, 219 U. S. 537, 546, (56 L. Ed. 326), speaking through Mr. Justice Lurton, said:

> "Upon its face the act (of June, 1897) is neither more nor less than a proposal by the Government for an exchange of claims to land unperfected, or lands under patents, situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere."

The State Lieu Land Act provides for two separate and distinct classes of cases.

1st. The first class of cases embraces those where for various reasons school lands were lost to and never vested in the State. This class is not here involved.

2nd. The second class of cases is made up of those in which the State lost no lands but received title, and while the title was still in the State it became desirable to the Government, perhaps also to the State, that an exchange of the lands should be made. One of the cases where such an exchange was desirable was the creation of a forest reserve surrounding the State lands. To this class the case at bar belongs.

As to this class the statute was and is a standing offer by the Government to exchange other Government lands for the State lands so included in the forest reservation.

This court in Roughton v. Knight, supra, at page 546, clearly shows, that justice to parties whose lands had been included, without their consent, in forest reserves, required the passage of such act; the court says:

> "The reasons for the provision are found in the disadvantages which result to such a settler or owner who had acquired his right before the creation of a reservation in the public land surrounding him. He was thereby isolated from neighborhood association, and deprived of the advantage of schools, churches, and of increasing value to his own land from occupation by others of the lands thus devoted to reservation purposes."

The same reasons, added to the Government's desire to preserve the integrity of the forest reserve, apply, and account for the exchange provisions in the State Lieu Land Act.

As to the time of the vesting of title, the State Lieu Land Act here involved, is more favorable to the State, than the Forest Reserve Lieu Land Act is to the selector thereunder, in the following particulars:

First: The State Lieu Land Act is a grant *in praesenti* of the selected lands—awaiting only their identification by selection—with all the characteristics of such a grant. The words used by Congress being "other lands of equal acreage are *hereby* appropriated and *granted* and may be selected by said State;" whereas the Forest Reserve Lieu Land Act was not a grant *in praesenti;* the words "grant" or "granted"

not being used, the language used merely being the settler or owner "may select in lieu thereof, . " etc.

Second: The State Lieu Land Act here under consideration expressly provides that the "selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections," thus showing that Congress intended that the act of "selection," should, of itself, "be a waiver" of the State's rights in the relinquished land, without awaiting the approval of the selection by the Land Department; and it has been so held in the Deseret case, supra.

Third: The beneficent purposes of the State Lieu Land Act—with no element of sordid or selfish interest to be served—being a grant to a sovereign state for educational purposes, for the benefit of all its citizens who are at the same time citizens of the Nation, entitles such act to a more liberal construction in favor of the grantee than applies to the Forest Reserve Lieu Land Act, in which the United States is merely making an offer of exchange, with no beneficent purposes in view.

10. Decisions Construing the Exchange Provisions of the Forest Reserve Lieu Land Act of June 4, 1897.

The following decisions of the Interior Department, construing the exchange provisions of the Forest Reserve Lieu Land Act of June 4, 1897, (30 Stats. 36), all hold that a selector acquires the equitable title to the selected lands when he has done all that the law and the authoritative regulations require of him; and that this vesting of the equitable title is not postponed until the Department decides that the selector has complied with the law and the regulations.

Gideon F. McDonald, 30 L. D. 124.
Clark vs. Northern Pac. 30 L. D. 145.
Kern Oil Co. vs. Clarke, 30 L. D. 550.
Gray Eagle Oil Co. vs. Clarke, 30 L. D. 570.
Kern Oil Co. vs. Clotfelter, 30 L. D. 583.
Mary E. Coffin, 31 L. D. 175.
Kern Oil Co. vs. Clarke, on Review, 31 L. D. 288.
Bakersfield Co. vs. Saalburg, 31 L. D. 312.

In the case of Kern Oil Company, et al. v. Clarke, 30 L. D. 550, (the leading case upon the subject,) the Secretary of the Interior had under consideration selections made under the Act of June 4, 1897. The decision by the Secretary discusses the various cases passing upon the question, and continues as follows:

> "The supreme court held, in the Shaw-Kellogg case, that lands vacant and 'not known to contain mineral' at the time of selection, passed under the act of 1860, whether subsequently discovered to be mineral or not. The same rule should be applied to selections under the law of 1897. It would be strange indeed, if by the latter act, Congress intended that one who, accepting the government's offer of exchange, relinquishes a tract to which he has obtained full title in a forest reservation, and in lieu thereof selects a tract of land which at the time is vacant and open to settlement, and does all that is required of him to complete the selection and to perfect the exchange, should thereby acquire only an inchoate right to the selected tract, liable to be defeated by subsequent discoveries of mineral at any time before patent, or before final action upon the selection by the land department. Such a construction would not only tend to defeat the objects for which the act was passed, by discouraging owners of lands in forest reservations from giving

up their titles, but would be against both the letter and spirit of the act. Parties would be slow indeed to relinquish their complete titles if it were once understood that they could obtain only doubtful or contingent rights in return for them. It could not have been the intention of Congress that parties accepting the government's offer of exchange should be embarrassed by any such conditions of doubt and uncertainty.

"The Department accordingly holds:

"(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof.

"(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date.

"(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

"These principles are in no sense antagonistic to the established doctrine of the jurisdiction and control of the land department over the disposition of the public lands. Undoubtedly such jurisdiction and control exist until patent has been issued. Knight v. United States Land Association (142 U. S., 161); Michigan Land and Lumber Co. v. Rust (168 U. S., 589); Brown v. Hitchcock (173 U. S., 473); Hawley v. Diller (178 U. S., 476).

This jurisdiction extends to determining the question, whether or not the equitable title has passed, but it has never been held that where such title has once actually vested the land department has the power to destroy it. As said in Michigan Land and Lumber Co. v. Rust, supra;

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. Strother v. Lucas, 12 Pet., 410, 454; Grignon's Lessee v. Astor, 2 How., 319; Chouteau v. Eckhart, 2 How., 344, 372; Glasgow v. Hortiz, 1 Black, 595; Langdeau v. Hanes, 21 Wall., 521; Ryan v. Carter, 93 U. S., 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. 2449; Frasher v. O'Connor, 115 U. S., 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, Bagnell v. Broderick, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

"* * * In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

"See also Cornelius v. Kessel, (128 U. S., 456); Orchard v. Alexander (157 U. S., 372); and Parsons v. Venzke (164 U. S., 89). So, too, with respect to selections under the act of 1897. The land department has the jurisdiction and power, at any time before a patent is issued, to institute and carry on, after appropriate notice, such proceedings as may be necessary to enable it to

determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. *But the determination, when had, must relate to the time when, if at all, the selector has done all that is required of him in order to perfect his right to a patent.*"

(Page 564.) (The italics are ours.)

In the case of Kern Oil Company v. Clotfelter, 30 L. D. 583, which also arose under the Act of June 4, 1897, the Assistant Secretary in sending the case to the Commissioner of the General Land Office for further proceedings, uses the following language:

"You are accordingly directed to cause a hearing to be had upon said protests, at which the protestants will be required to take the burden of proof. The evidence bearing upon the mineral character of the lands selected should not be restricted to mineral discoveries or development upon these lands and to their geological formation, but may extend to the discovery and development of mineral on adjacent lands, and to their geological formation. The inquiry respecting both the occupancy and character of the selected lands will be directed to the conditions existing and known at the time (January 5, 1900) when Clotfelter filed the selections and submitted the requisite proofs in support thereof. No consideration will be given to any changes subsequently occurring or to any mineral discoveries or development subsequently made." (Page 587.)

In the case of Gideon F. McDonald, 30 L. D. 124, a forest lieu selection under the Act of June 4, 1897, was involved. In stating the matter, the Secretary of the Interior says:

"When the selection was filed the land embraced in the accompanying deed of relinquishment and reconveyance was within the limits of the forest reserve and a proper basis for a selection under said act, and the land selected by McDonald in exchange was, according to the records of your office, of the character subject to such selection and free from other claim or appropriation. By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, *thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired.* Your office will therefore carefully examine the papers and records pertaining to this selection and if it is found to be otherwise free from objection, the fact of the elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made, after full compliance by the claimant with the lieu land act and regulations will not prevent approval of the selection." (Italics ours.)

The same ruling was adopted in the case of Kern Oil Company v. Clarke, 31 L. D. 288.

The case of Farnum vs. Clarke, 148 Cal. 610, decided in 1906, was an action for specific performance of a contract by which Clarke had agreed to acquire certain lands by forest lieu selections, and sell them to Farnum. After making the selections, Clarke

refused to convey. The defense to the action was that Clarke had no title yet to convey, his selections standing unapproved. The court sustained plaintiff's position, and what was said of forest lieu selections is so appropriate here, and, we think, so convincing that we quote from the case at some length.:

> "When such a selection is made the locator acquires an interest in the land selected, and immediately upon the filing of such selection is to be regarded as the equitable owner of such land. (Kern Oil Co. v. Clarke, 30 L. Dec. Dept. Int., 550.) * * * * * *
>
> "It is to be remembered that under the act, one who has conveyed his title to lands within the forest reservation is not taking lands in lieu thereof, by grace of the government, but under a solemn contract relative to an exchange of lands. The United States pledged itself to grant him from the public domain lands of equal extent and area to those that he conveyed to it, the only condition imposed by the act being that, as so selected by him, they should be vacant and open to settlement. When a locator under the act files his selection in compliance with the rules and regulations of the land department, and accompanies it with proof that the lands of which he makes selection are vacant and open to settlement and these facts are true, the commissioner of the general land office has no arbitrary right to reject the selection, but must approve it, and upon such approval the right of the selector to the land takes effect by relation as of the date of his original selection."

It was also held in the same case, that the withdrawal of lands in a township from entry by order of the Commissioner after the selection papers had been filed, could not affect or interrupt the selection.

11. Change of View by Land Department based on Misconception of the Cosmos Case (190 U. S. 301.)

The doctrine established in Kern Oil Company v. Clarke, (30 L. D. 550), and other decisions in volumes 30 and 31 L. D., hereinbefore cited, remained the law of the Land Department until after the doctrine of such cases was supposed to have been changed by the Supreme Court decision in the Cosmos case (190 U. S. 301). This supposed Cosmos case doctrine was accepted by the Department for the first time in the case of C. W. Clarke, 32 L. D. 233, 235; and frequently thereafter the Cosmos case was made the basis of departmental decisions upon which the Government here relies; notably the case of Miller v. Thompson, 36 L. D. 492—the basic departmental decision relied upon by counsel for the Government here—which adopted the supposed doctrine of the Cosmos case as the law, in the following language (pp. 493-494):

> "In the pioneer cases, the Department entertained opinion, that under the act of 1897, questions respecting the class and character of the selected lands were to be determined by conditions existing at the time when all requirements laid upon the selector had been satisfied, as of which time by relation he would be regarded as the equitable owner, and no changes in such conditions subsequently occurring could affect his rights. The Supreme Court, however, when the question was presented in the case of Cosmos v. Gray Eagle Oil Co. (190 U. S. 301), enunciated the rule which controls in respect to this matter. The view borne by the weight of authority, is, that until the Land Department shall have determined the questions of law and fact involved in the

> proffered selection, and a formal approval has been given, the equitable title to the land selected does not pass from the Government. Clearwater Timber Co. v. Shoshone Co., 155 Fed. 612., and authorities cited in the opinion. Until such approval there is indeed in legal contemplation, no selection in fact, but only an application to select."

The Clearwater-Shoshone case referred to therein was another case based upon the supposed doctrine of the Cosmos case, and of course falls with such doctrine.

It will be noted that no other reference is made, in Miller v. Thompson, to the cases overruled, than to designate them as "pioneer cases of the Department," and that the sole basis for departing from the law of such decisions, is that the Supreme Court in the Cosmos case has "enunciated the rule that controls." There was no attempt to justify the Department's change of ruling, by any process of reasoning, or by pointing out any errors in the argument or conclusions of the former decisions; but the change of ruling is based entirely on the supposed compelling force of the Cosmos case; and when this foundation for the change of ruling is removed—as it has been in Daniels v. Wagner, as we will hereafter show—and as it is removed by a careful study of the opinion in the Cosmos case—it would seem that the change in ruling should likewise disappear.

Following this erroneous construction of the Cosmos case, and relying upon such case, the Assistant Secretary, in this case, quotes from the opinion in the Cosmos case as decisive of the case at bar, deducing therefrom the erroneous conclusion that no rights in the selected lands vested in the State until the approval of the selection by the Secretary of the Interior.

This brings us to the decision of the Circuit Court of Appeals here, from which this appeal is taken, which likewise follows this erroneous construction of the Cosmos case.

12. Decision of the Circuit Court of Appeals here Based on Misconstruction of Cosmos Case, of Daniels v. Wagner, and Wisconsin v. Price County.

In the decision of the Circuit Court of Appeals in this case, the law controlling the case at bar is made to pivot entirely upon that court's misconstruction of the Cosmos case, Daniels v. Wagner and Wisconsin v. Price County, as is apparent from the following extract from the opinion of the court below, which contains the essence of such opinion (See Record page 81) viz:

> "We think that it has been clearly determined by the Supreme Court that the State down to the time of the approval of the application by the Commissioner of the General Land Office acquires no estate, legal or equitable, in the lands applied for as against the government. The only right which it acquires by its application and the proceedings in the local land office is to be protected against any subsequent right in the tract being acquired by private parties in case the government decides to dispose of the lands as agricultural lands.
>
> "This in our judgment is placed beyond controversy by the decision of the Supreme Court in Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 511, 512, and more particularly by the decision of Cosmos Company v. Gray Eagle Oil Co., 190 U. S. 301. The latter case is directly in point. There are minor circumstances in which

it differs from the present case, but none of these constitutes a substantial ground of distinction. * * *

"The case of Daniels v. Wagner, 237 U. S. 547, does not impair the authority of the Cosmos case, * * * . All the Daniels case decides is this: That the applicant for lieu lands, by presenting his application to the local land office, acquires the right as against private individuals whose rights in the property arise subsequently, to be protected against such subsequent rights;"

It therefore becomes necessary to carefully examine such cases, which are deemed controlling here.

13. The Decision in the Cosmos Case Does Not Support the Government's Contention.

We find nothing in the Cosmos case to warrant any such deductions as seem to be made from it. That case, according to the bill of complaint filed in the Federal Court, was pending in the Land Department undecided when the bill was filed, and it was in fact still so pending in the Land Department when the case was decided in this Court. The case arose upon selections made, and relinquishment deeds filed under the Act of June 4, 1897. It seems to have been an easy case for the Land Department and some of the courts to misunderstand. Daniels v. Wagner, 237 U. S. 547, 560.

As originally brought, a Receiver was asked and an injunction to prevent waste in the Cosmos case. No appeal to the Circuit Court of Appeals or to this Court was taken from the rulings of the Circuit Court for the Southern District of California denying the receivership and the injunction.

The questions of preventing waste and preserving the property and its fruits, pending the proceedings in the Land Department, were therefore not before this Court. 190 U. S. 307.

The case stood upon the prayer of the bill "that complainant might have the judgment of the court that the full and complete equitable title to an undivided three-quarters interest in the property is vested in the complainant" etc., and the allegations of the bill supporting that prayer, these being challenged by demurrer. (Pages 306 and 307.)

Among the allegations of the bill are these: That Clarke was the owner of the lands there used as base lands through patent from the United States: that the base lands were included in a forest reserve: that thereupon Clarke relinquished and conveyed the base lands to the United States and selected in lieu of them the lands there in controversy: that the selected lands at the time of the selection were surveyed, unappropriated, vacant, non-mineral public lands: that the Register and Receiver of the local Land Office accepted Clarke's deed and filing: that defendants were in possession of the lands in controversy under mineral locations, having discovered oil therein: that the defendants protested the selection in the Land Department on the ground that the selected lands were not subject to selection because they were mineral lands: and that the protestants asked that the selection be rejected and disapproved. And the bill further alleges that "such protest is now pending before the Commissioner of the General Land Office." 190 U. S. 302, 303. This Court, in its opinion, holds:

First. That, the matters being in issue, before the courts could award the demanded relief to complainant, the alleged facts, (a) as to the base lands,

(b) as to the selected lands, and (c) as to the selection, must be adjudged and determined in its favor.

Second. That although courts can usually adjudge the facts in issue before them, the courts could not hear or determine any of these alleged facts *in that proceeding* because they were then pending in the Land Department, with jurisdiction in that department, and it was not proper that the court should forestall the decision of the Land Department (citing previous decisions of this Court.)

Third. That the mere allegations of the complainant as to the facts so in issue could not in that proceeding take the place of a determination of the facts since the complainant could not thus for himself determine the facts in issue in his own case.

Fourth: That the Register and Receiver of the local Land Office had not decided these facts, or any of them, and those officers were without authority to decide them. That there had therefore been no adjudication of the facts in issue.

Fifth. It could not be said that "complete equitable title" to the lands, such as would entitle the complainants to a decree in that case, existed in the complainant without determining and adjudging these undetermined essential facts which, as above indicated, and because of the special situation there, could not be determined in that suit.

And the Court held since these facts had not been determined, and could not be determined in that suit, and their determination was necessary before decree could be there entered for complainant, that the case was not in position to be tried in the court.

The Court, therefore, dismissed the bill in that case, not indeed upon the merits, but without prejudice. It was thus left so that when the facts should

be determined by a competent tribunal, or when all obstacles to their determination by the courts should removed, such suits might be brought as would protect and vindicate the rights of complainant, if indeed it should be found to have such rights.

As we view it, the above constitutes the whole of the things decided in the Cosmos case. The opinion sums up the matter thus:

> "Concluding as we do,, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such questions themselves. The Government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction cannot be taken away from it by the courts. United States v. Schurz, 102 U. S. 378, 385."
>
> 190 U. S. 315.

We can find no suggestion in the Cosmos case denying that the rights attach in favor of the selector when he has done that which the statute requires, notwithstanding delay of the approval by the Secretary of the Interior—no hint that the long line of decisions by this Court holding that rights accrue when the entryman has fully performed, was there overruled or intended to be overruled. Not one of this long line of cases is even mentioned in the opinion.

The court did not there have before it, much less did it decide, any question as to the point of time when equitable rights *vested* in the selector. It was concerned only with the question as to that point of time

at which the title could be considered so *adjudged* as to entitle complainants to a decree in a court which could not itself adjudge the facts. Indeed in that case this language is used:

> "It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the lands was made in the local land office, and when the patent subsequently issues the legal title will vest from the time of the selection."
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> 190 U. S. 310.

Our conclusion that it was not there intended to overrule or modify any of the decisions of this Court to the effect that title vests at the time when the entryman has completed his compliance with the land laws is strengthened by the following paragraph in the opinion:

> "Again, in Gray Eagle Oil Company v. Clarke, 30 L. D. 570, it was also held that under the act of June 4, 1897, it must be shown that at the date of selection the selected lands were unoccupied as well as non-mineral in character, and that until that proof was submitted a *selector had not done that which converts the offer of exchange into a contract fully executed on his part whereby he secures a vested right in the selected land.* It is unnecessary for the court to express an opinion as to the correctness of these views of the Land Department as stated in its opinion in the above cases." (The italics are ours.)
>
> 190 U. S. 314.

Here the Court calls attention to a decision in the Land Department, which in harmony with decisions of this Court, some of which we have cited

above, holds, among other things, that where the selector has done all that is required of him under the statute therein involved, the offer of exchange as made by the Government is thereby converted "into a contract fully executed on the part of the selector, whereby he secures a vested right in the selected land." And upon that holding of the Land Department this Court goes on to say that, "It is unnecessary for the Court to express an opinion as to the correctness of these views."

When we remember that the views of the Land Department expressed by the Secretary in the case of Gray Eagle Oil Company v. Clarke, supra, were expressly based upon the long line of decisions by this Court, many quotations from which were made by the Secretary, and when we remember further that this long line of decisions is not at all mentioned, much less expressly overruled, in the Cosmos case, and then read from the Cosmos opinion that it was unnecessary for the court to express an opinion upon these views of the Land Department, it seems to us utterly impossible that the court could have intended there to overrule and reverse the decisions of the Land Department and the clear decisions of this Court holding that the point of time at which title vests is that point of time when the entryman has performed the things required by the statute as the conditions upon which he shall receive the land.

It is undoubtedly true, that the opinion of this Court in the Cosmos case contains certain general language that has been much misunderstood by the courts and the departments, and which taken alone, forgetting the facts and the context, has given rise to the erroneous opinion that until a forest lieu selection is approved by the Department, no vested right is obtained by the selection.

This Court in the Weyerhaeuser case (219 U. S. 380), in speaking of similar general language in the Sjoli case (199 U. S., 564), when construed in forgetfulness of the facts there involved, said:

> "That the general expressions in the Sjoli case are not persuasive here, clearly results from the demonstration which we have previously made, *that to apply them would be, in effect, to destroy the indemnity provisions of the granting act.*"

And it may be said here with equal force, that to give to this general language of the Cosmos case the meaning which the lower court gave to it, and which the Government is claiming for it, would not only overrule without referring to them many well-considered decisions of this Court and ignore the facts three involved and the real reasoning of the Court in that opinion, but also *would practically destroy the exchange feature of the Forest Reserve Lieu Land Act;* as it is upon the *ascertainable conditions at the time of the selection*, that the selector must rely in maknig his selection and not upon conditions that may thereafter occur.

Fortunately, however, we are not driven to rely upon our own interpretation as to what the Cosmos case decided, but we have in the later case of Daniels v. Wagner, 237 U. S., 547, this Court's own interpretation of the meaning of the Cosmos case, upon the very question here at issue; namely, as to whether after a Forest Lieu selector had fully complied with the law, and completed his selection, and the same was pending in the Land Department unapproved, the Secretary could make other disposition of the property — and the answer was unmistakably "NO."

14. The Case of Daniels v. Wagner, 237 U. S. 547, (59 L. Ed., 1102) Analyzed, and Shown to Sustain Our Contention Here, and to Hold That the Cosmos Case is Not Opposed to Our Position.

The case of Daniels v. Wagner, just mentioned, was a case in which the Secretary of the Interior had rejected a Forest Reserve Lieu Selection, in all respects regular and valid, and had awarded the land to subsequent claimants under the Homestead, Timber and Stone Acts. The reason given therefor, was that as the local land officers had in the first instance erroneously rejected the Daniels Forest Reserve Lieu selection, when they should have accepted it; and as the entries of the homesteaders and others had been subsequently allowed, the Department would not be justified in cancelling the later entries in order to protect the equities of Daniels under his prior selection. The Secretary used the following language in so deciding:

> "It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so Daniels will not now be heard to question the correctness of that disposition."

Daniels, relying upon his fully completed selection as vesting the equitable title in him, brought suit in equity against the successful entrymen, who had obtained patents, to have them declared trustees of the title for his benefit. The trial court, and on appeal, the Circuit Court of Appeals for the Ninth Circuit, sustained a demurrer to Daniel's complaint, on the ground that the action of the Secretary of the

Interior in refusing Daniel's claim was justified under the law as decided in Cosmos Exploration Co. v. Gray Eagle Oil Company, 190 U. S., 301, holding that the selector's title did not vest until approved by the Secretary; and it was therefore within his discretionary power to reject the selection, and allow the homestead and other entries which were subsequent in time.

In reaching its conclusions, the trial court (see Daniels v. Wagner, 194 Fed. pp. 973-975), refers to the case of Cosmos v. Gray Eagle Oil Co., 190 U. S., 303, and says:

> "In the latter case (the Cosmos case) the court said that the complete equitable title of the selector is not 'made out and cannot exist until a favorable decision by that Department (General Land Office) has been made regarding the sufficiency' of the proof and his right to the selected land, and that 'there must be a decision made somewhere regarding the rights asserted by the selector of the land under the act before complete equitable title to the land can exist; the mere filing of papers cannot create such a title. The applicant must comply with and conform to the Statute, and the selector cannot decide the question for himself'; and that authority to determine whether the selector had complied with the provisions of the act and the regulations of the Department is not vested in the local land officers, but in the Commissioner of the General Land Office, and until he has approved the application, the selector is not vested with the equitable title to the land he assumes to select.' Under this rule, it seems to me that the plaintiff acquired no title or right to the land selected by him by the mere filing of his application, and that it was within the power and jurisdiction of the Land Department to reject the same, and award the land to a subsequent entryman under the Timber

and Stone Act; and as a consequence that the plaintiff is not entitled to the relief prayed for in his bill."

Upon Appeal to the Circuit Court of Appeals, that Court (205 Fed. 235-238), speaking through Circuit Judge Gilbert, cites the Cosmos case as authority for its decision, and quotes therefrom, among other things, the following language:

> "There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete, equitable title to the land can exist. The mere filing of papers cannot create such title."

In commenting upon this language, the Court of Appeals said, page 238:

> "It is urged that this language of the court is dictum but we do not so regard it * * * and we deem it controlling in the decision of the present."

That the entire decision of such court was based upon the decision in the Cosmos case is evidenced by the following language of Judge Gilbert:

> "We consider the decision in the Cosmos Exploration Company case authority for sustaining the decree of the court below."

Bottom of page 239 and top of page 240.

This construction of the meaning of the Cosmos case was rejected by this Court when the case of Daniels v. Wagner reached this Court upon appeal. In that case this Court replies to this holding of the lower court that its decision is based upon the Cosmos case by saying:

"But we are of the opinion that this interpretation of the Cosmos case cannot be justified."

237 U. S., p. 560.

It is true that this Court in Daniels v. Wagner does not, in so many words, retract the general language of the Cosmos case upon which the lower courts relied in reaching their decisions. That general language interpreted by the facts and the reasoning there, needed no retraction. This Court in the Wagner case places its decision upon the general grounds that no right to decide contrary to the law, existed in the Secretary of the Interior, and that the facts and the law, and not the will of the Secretary of the Interior fixed the rights of the entryman. What this Court there said on this subject applies so aptly to the action of the Secretary of the Interior and the decision of the lower court in the present case, that we take the liberty of quoting the following rather lengthy extract therefrom p. 557.

"This brings us to determine whether the Land Department had a right to reject a prior lieu land entry or entries and award the land to subsequent and subordinate applicants under the assumption that it possessed a discretionary right to do so, an authority the possession of which was sustained by both the courts below.

"In primarily testing the proposition from the point of view of principle it is well at once to exactly fix its true import. In doing so it is to be conceded, a, that the act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation to apply to the land office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation and upon the doing and offering

to do everything required by the law or the lawful regulations of the Land Department to be done or offered to be done for that purpose; b. that in the particular case the application to enter the lieu land came within the grant of the statute and all that was required by law or lawful regulation was done by the applicant in order to obtain entry, and c, that it was the plain duty of the proper authorities of the department on the filing of the entry in due course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where under an act of Congress a right is conferred to make an application to enter public land and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done and thus to deprive the individual of the right which the law gives him. And it becomes moreover certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation. And the inherent vice which thus clearly appears from the mere statement of the proposition when reduced to the ultimate conceptions which it involves is not relieved by the suggestion that the action taken in this case by the Department rested not upon the assumption that there was a

general discretion, but upon the assumption that such discretion arose because of the primary mistake made by the local land officers concerning the lieu entry and the allowance of the filing of claims which were subsequent in date. We say this because thus seemingly to limit the discretionary power exerted would in our opinion aggravate its manifest unsoundness for the power as thus qualified would come to this: That the commission of a wrong by the officers of the Department in disobeying the act of Congress and in denying to an individual a right expressly conferred upon him by law would become the generating source of a discretionary power to make the disobedience of law lawful and the taking away of the right of an individual legal. But this in another form of statement brings the proposition back to its real and essential basis."

We submit, with absolute confidence, that such decision of this Court in Daniels v. Wagner, both in the point actually decided, and upon principle and reasoning, is conclusive of this controversy. The decisions do not contain a more positive affirmation of the proposition that when an entryman has fully complied with the law, and thus earned the title, rights then vest in him and he cannot be deprived thereof by any subsequent departmental action. This principle is decisive of the present case.

15. The Government's Construction of Daniels v. Wagner.

In attempting to dispose of the case of Daniels v. Wagner, (237 U. S., 547) as sustaining the position of the State of Wyoming here, the Honorable Bo Sweeney, Assistant Secretary of the Interior, when this case was before the Department, said (Record page 48,)

"Daniels v. Wagner involved the rights of a forest reserve lieu selector under a prior selection as against individuals who received patent under subsequent homestead and timber and stone entries. The land department there had claimed the right under its discretionary power to reject a prior reserve lieu selection and patent the land to subsequent claimants. This the Supreme Court held was beyond its power."

Why did the Supreme Court so hold? The reason, as stated in this Court's decision, is in substance that the lieu selector by full compliance with the law, had acquired a vested right, which made the later entries unlawful, and the Government's patent in their favor of no avail. The rejection of the prior valid selection was as much beyond the power of the Secretary as was the issuing of patent to the new entryman. The new patent was beyond his power because the old rejection was beyond his power. When the present case was before the Secretary of the Interior — in the decisions both of Assistant Secretary Sweeney, and upon rehearing before First Assistant Secretary Vogelsang — the discussion in the departmental opinions of the case of Daniels v. Wagner was prefaced with the following quotations from the official syllabus of such case, namely (Record page 56,)

"One who has done everything essential, exacted either by law, or the lawful regulations of the Land Department, to obtain a right from the Land Office, conferred upon him by Congress, can not be deprived of that right either by the exercise of discretion or by a wrong committed by the Land Officers."

It is then sought to show that this Daniels case is not in conflict with the principles deduced by the department from the Cosmos case.

Upon rehearing, First Assistant Secretary Vogelsang attempted to dispose of the Daniels case by saying (Record page 56),

> "This Department had disregarded the rights of the prior forest lieu applicant, and had patented the land to junior homestead and timber land claimants. This was done under the assumption that the officials of the land department possessed a broad discretionary power to so dispose of the land upon equitable considerations. The Court (in Daniels v. Wagner) decided there was no basis for the assumption of such a discretionary power * * * * The Court did not decide that the lieu selector by compliance with all the essential requirements of the law and regulations, had obtained a vested equitable title to, or a vested interest in the land. It was decided that by the acts of the lieu selector he acquired priority, and a right that was paramount to *subsequent* claims."

The Secretary in this interpretation of the Daniels case accepts but half of the Court's conclusion (c) from the principles (a) and the facts (b) which we have quoted from the opinion in that case. The Secretary only concedes that the department was without authority to convey the land to someone else. The conclusion of the Court (c) is "that it was the plain duty of the proper authorities of the Department on the filing of the entry in due course to *grant* it." The Department had no more right to retain the lands for the United States than to grant them to some other entryman.

In the Daniels case the selection had never been approved by the Secretary of the Interior, yet it was held good against a subsequent entryman having United States Patent therefor. A United States

patent is the most formal and conclusive evidence of ownership that the law can confer. It passed to the defendants in the Daniels case all the title, interest and dominion over the land that the Government possessed, and therefore the patentee stood in the Government's shoes, so far as the title was concerned, and the reason that such patents did not pass the equitable as well as the legal title, was that the *equitable title had already passed to the selector,* by his prior unapproved selection, *and the Government had no lawful right to make any other disposition of the property;* hence the patentee was rightfully held to be a trustee of the legal title for the benefit of the selector, who was entitled to the land. What difference does it make, that the Secretary of the Interior in the Daniels case claimed the right to reject the Daniels selection, and allow and patent the later entries, as a proper exercise of his "discretionary powers," rather than under a positive legal right to do so? The reason he had no such "discretionary power," was because *he had no legal right to reject the title of the selector who had fully complied with the law.* This is clearly pointed out in Daniels v. Wagner in the very terse and forcible language heretofore quoted from that case.

16. The Law as to When Railroad Indemnity Selections Take Effect so as to Prevent Other Disposition of the Selected Lands---and the Correct Construction of Wisconsin v. Price County as Fixed by Weyerhaueser v. Hoyt (219 U. S. 380; 55 L. Ed. 258.)

The Court of Appeals in its decision, and counsel for the Government in the presentation of this case before that Court, placed much reliance upon the

decision of Wisconsin v. Price County 133 U. S., p. 496; 33 L. Ed. p. 687, and cited that case to show that in railroad indemnity selections the law is settled that no rights attach under such selections until the same are approved by the Secretary of the Interior, and hence by analogy it was claimed that the same doctrine should apply in the case at bar.

We admit that there are a number of expressions in the opinion in that case, that, disassociated from the point actually decided, may give rise to this construction of the case; but the case really only decided the one point, that the land covered by railroad indemnity selections is not subject to taxation by the State, until the selections have been approved by the Secretary of the Interior. In that particular case the selections involved had not been approved by the Secretary of the Interior, and the Secretary was insisting that the railroad company had already received over forty thousand acres more indemnity land than it was entitled to receive. The decision merely held that the approval of the Secretary was essential to the efficacy of the selections, so as to give the State the right to tax the selected lands. As a grant of indemnity lands in that case was by the statute expressly made "subject to the approval of the Secretary of the Interior," the Court held that the mere filing of the list of indemnity selections by the railroad company did not demonstrate that the selections were legal and valid; and that until the validity of the selections was determined by the approval of the Secretary, the State could not tax them. The case did not hold that the filing by the railroad company of a list of indemnity selections created no interest in the selected lands, or that the Government could dispose of such lands to others as it saw fit, at any time up to the date of

approval of such selections by the Secretary of the Interior — and such is not the law. The general expressions in the opinion do not authorize the conclusion that such is the law except when such general expressions are wrenched from their context.

Erroneous conclusions were similiarly drawn from the case of Sjoli v. Dreschel, 199 U. S. 564, and such erroneous conclusions were corrected by this Court in the case of Weyerhaeuser v. Hoyt, 219 U. S. 380. The opinion in the Weyerhaeuser case so closely touches some of the matters under discussion that we beg to make the following quotation:

> "It was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company subject to the approval of the Secretary of the Interior that a construction which would deprive the railroad company of its substantial right to select and would render nugatory the exertion of power of the Secretary of the Interior to approve lawful selections when made would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in the list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be appropriated at will by others would be destructive of the right of selection, is not only theoretically apparent from the mere statement of the proposition, but has moreover in actual experience been found to be the practical result of carrying that doctrine into effect.
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> * * * * * *
>
> The requirement of approval by the Secretary consequently imposed on that official the duty of

determining whether the selections *were lawful at the time they were made*, which is inconsistent with the theory that anyone could appropriate the selected lands pending action by the Secretary. The scope of the power to approve lists of selections conferred on the Secretary was clearly pointed out in Wisconsin Central Railroad v. Price, 133 U. S., 496, 511, where it was said that the power to approve was judicial in its nature. Possessing that attribute the authority involved not only the power but implied the duty to determine the *lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections.* This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior, was to bring into play the elementary principle of relation, repeatedly sanctioned by this Court and uniformly applied by the Land Department from the beginning up to this time under similar circumstances in the practical execution of the land laws of the United States." (The italics are ours.)

This Court in the Weyerhaeuser case then proceeds to examine and quote from a number of previous authorities, after which the Court says:

"Despite the doctrine of this court as expounded in the cases previously referred to, the unbroken practice of the Land Department from the beginning in the execution of land grants, impliedly sanctioned by Congress during the many years that administrative construction has prevailed, and the destructive effect upon rights conferred by land grant acts which would result

from applying the contrary view, it is yet urged that this must be done because of decisions of this court which it is insisted constrain to that conclusion. One of the decisions thus referred to is Sjoli v. Dreschel, 199 U. S. 564, to which we have previously referred, and others are cited in the margin."

Among such cases cited in the margin are Wisconsin v. Price County, relied upon by the lower court and by the Government in this case.

The Court then proceeds to analyze the cases which it is claimed hold to the contrary view, and says:

"What we have already said as to the Sjoli case would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration nor even by way of *obiter* was an opinion expressed on such question. Indeed, all the cases relied upon may be placed in one of three classes:

"a, those involving the nature and character of the right, if any, to indemnity lands prior to selection; b, whether such lands, after filing of the list of selections and before action by the Secretary of the Interior thereon, could be taxed by a State to the railroad company as the owner thereof;

(Such a case was the case of Wisconsin v. Price County relied upon by the Court below and by the Government as sustaining the Government's position in this case.)

"and c, those which were concerned with the nature and character of acts which were adequate to initiate a right to public land which would be paramount to a list of selections when the acts

were done before the filing of the list of selections. In none of the cases, moreover, was the well-settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon the previous decisions to which we have referred to expounding the doctrine of relation were approvingly cited or expressly reaffirmed.

"The Sjoli case, from the facts we have already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which when separated from its context and disassociated from the issues which the case involved, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohens v. Virginia, 6 Wheat. 399, so often since reiterated and expounded by this court, to the effect that 'General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.' The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the Sjoli case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval, by the Secretary of the Interior, of a lawful list of selections. That the general expressions in the Sjoli case are not persuasive here clearly results from the demonstration which we have previously made *that to apply them would be in effect to destroy the indemnity provisions of the granting act.* Moreover, that serious general injurious consequences would arise from treating the expressions relied upon in the Sjoli case as persuasive is clear, (a) because to do so would

result in the overthrow of the uniform rule by which the Land Department has administered land grants from the beginning, a rule continued in force after the decision in the Sjoli case, because of the administrative conclusion that that case should be confined to a like state of facts and not be extended to other and different conditions (25 Opin, Atty. Gen. 662; (b) because of the destructive effect upon rights of property and the infinite confusion which would now arise from extending, under the circumstances stated, the observations in the Sjoli case to the wholly different state of facts presented upon this record."

To the same effect, and elaborately reviewing the law on the whole question of indemnity railroad selections, was the case of Central Pacific Railroad Co. v. Lane, 46 Appeal Cases, District of Columbia, 347, recently decided.

If we adopt here the rule so clearly stated by this court that "general expressions in every opinion are to be taken in connection with the case in which those expressions are used," the general expressions in the Cosmos case are entirely without force to sustain the rejection of the selection in the case at bar.

Among the averments of the bill in the Cosmos case is an allegation,

> "That after the land had been selected by complainant's assignor, the defendants filed in the United States land office at Visalia, California, a written verified protest against such selection in which protest it was alleged that the land selected by Clarke was not subject to selection by him under the act of June 4, 1897, above referred to, *because the same was mineral land* and was included within the boundaries of a valid placer mining location. The protest asks that the Commissioner

> of the General Land Office should order a hearing to determine the mineral character of the land and that the selection by Clarke be rejected and disapproved, and the bill specifically avers that such protest is now pending before the Commissioner of the General Land Office."
>
> 190 U. S. 304. (The italics are ours.)

The bill discloses that the attempted selection in that case was made December 8, 1899. (190 U. S. 303.) There were answers as wells a demurrers to the bill. In these answers it was averred that the "Valid placer mining location" was made June 2, 1899, some six months prior to the selection. (104 Fed. 20, 25.)

Even without these answers, the bill disclosed on its face that the selection was challenged in the Land Office proceedings on two grounds.

1st. That the land was "mineral land" at the time of the selection, and was therefore not subject to selection.

2nd. That the land was not vacant, was not "unoccupied", because of the placer location, and on that ground was not subject to selection.

The bill also alleges that the proceedings were still *in fieri* and undetermined in the Land Department.

Notwithstanding this situation the prayer of the complainants was,

> "That complainant might have the judgment of the court that the full and complete equitable title to an undivided three-quarters interest in the property is vested in the complainant" etc.

This made the question quite anomalous. The judgment and decree asked for could not be entered by the court so long as the issues made by the selection and the protest were undetermined. The court was

dealing solely with the question of *what action might be taken by the court.* Under the situation there nothing but an adjudged or determined equitable title could authorize a decree by the court. The complainant's assertions that he had title and the allegations of the facts upon which he based his title would have been sufficient to withstand the demurrer if the court could try the cause; but as the court could not try the cause, those assertions and allegations of fact were without force. Since the court could not try the cause, those facts must be determined by the tribunal in which the issue was joined, and so long as the case was undetermined in that tribunal the complainants could not be heard to allege anything as to the facts that were in issue in that tribunal. The situation in which the case stood, therefore, determines the meaning of the general expressions. For example, take the one most relied upon "there must be a decision made somewhere (either in this court or elsewhere) regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land (to-wit, such title as would authorize the court to enter the decree prayed for) can exist." The title which would avail complainants in that case was not title in fact or title that might be ascertained by an investigation of the facts. It was such title as would require the decree in complainant's favor without any investigation of facts upon which the title was based, since the court could not make such investigation. In other words, the expression "complete equitable title" as very carefully used all through the opinion means and can mean only an adjudged and determined title such as requires no further trial upon any issue of fact.

The court in that case did not forget that the complainants asserted title both in the way of con-

clusions and in the way of allegations of fact from which title was derived, and indeed as to these allegations the court again used general language, which has been relied upon as supporting the contentions of the appellee here. For example, referring to these allegations, the opinion says, "These assertions may or may not be true."

Again, "The selector cannot decide the question for himself."

A moment's reflection would disclose that these are not general rules for testing the bill of complaint on demurrer, nor general rules for testing a bill asserting rights to public lands acquired by proper entry. Ordinarily the allegations of fact in the bill are taken as true upon demurrer. Why, then, does the court say, "These assertions may or may not be true"? Merely because the court was not in position in that case to try the facts. It could not accept allegations, though ordinarily they pass current upon demurrer. Adjudged title was required, and nothing except adjudged title could be complete equitable title such as would require or authorize action by the court in that case.

17. The Authorities Relied Upon by the Government Here, in Addition to Wisconsin v. Price County and the Cosmos Case.

The authorities relied upon by the Government, as cited in the courts below, are either those involving railroad indemnity selections, since shown in the Weyerhaeuser case not to be subject to the construction claimed by the Government here; or the Cosmos case, or cases following the same interpretation of the Cosmos case as the Government is here

urging; all of which latter cases are destroyed as authority, under the construction placed upon the Cosmos case by this Court in Daniels v. Wagner, and under any just construction of the Cosmos case.

Such cases based on this misconstruction of the Cosmos case are:

Clearwater Timber Co. v. Shoshone Co., 155 Fed. 612;

Buena Vista Land Co. v. Honolulu Oil Co., 166 Cal. 71;

United States v. McClure, 174 Fed. 510.

An examination of the land office cases relied upon by the Government in the courts below shows that all of them which sustain the Government's contention, rest upon this rejected interpretation of the Cosmos case, and consequently cease to be authority under the correct construction of the Cosmos Case as declared in Daniels v. Wagner. These were:

Miller v. Thompson, 36 L. D., 492;

The case of C. W. Clarke, 32 L. D., 233;

The case of Thomas B. Walker, 36 L. D., 495;

The case of Southern Pacific, 41 L. D., 264;

Administration Ruling, 43 L. D., 293-294.

No other departmental decisions were cited; and these all being disposed of by Daniels v. Wagner and by an analysis of the Cosmos case, there are left no departmental decisions to uphold the Government's construction of the forest lieu land act.

Counsel for the Government, maintained in the lower courts and the Court of Appeals holds that "A selection is not *made* until approval by the Department"; and in support of this view, they quoted from Lindley on Mines, 3rd Ed., Sec. 143, to that effect.

The only cases cited in support of this conclusion by Mr. Lindley are Wisconsin R. R. Co. v. Price Co.,

supra, and the Cosmos case. The only other cases relied upon by Mr. Lindley are the departmental cases which have been likewise disposed of by Daniels v. Wagner.

In extenuation, however, of Mr. Lindley's erroneous conclusions, it must be borne in mind, that his views were written in 1914, before Daniels v. Wagner, had corrected the erroneous conclusions that had been drawn in certain quarters from the Cosmos case.

18. Further Analysis of the Contention of the Government Here, that a State Lieu Selection---Perfected in so far as the State's Action Can Perfect it---is Good as Against Subsequent Claims of Private Parties, but is not Good as Against the Government.

We respectfully submit that in dealing with State Lieu Selections, where the State has fully complied with all the prerequisites for acquiring title to the selected land, there is no basis of authority for holding — as counsel for the Government and the lower court here hold, in attempting to explain away the meaning of Daniels v. Wagner — that while no private individual can, by subsequent entry, acquire any rights in the selected land, nevertheless, the United States is not bound by such a selection, and may lawfully withhold or dispose of the title at its pleasure.

We admit that there are many cases, such as Frisbie v. Whitney, 9 Wall. 187, and the Yosemite case, 15 Wall. 77, where — in dealing with inchoate titles, mere incipient rights to public lands, such as settlers and pre-emptors obtain before full compliance with the law — it is held that while such parties as

between themselves, acquire rights measured by the relative priorities of their settlements or entries, they acquire no vested rights as against the United States, until all of the pre-requisites of acquiring title have been complied with by them. These cases, however, do not help the Government's contention here, where all the pre-requisites of acquiring title had been fully complied with, long before any attempt was made by the Government to make other disposition of the selected land. Here the State of Wyoming had accepted the Government's statutory offer of exchange of properties, and had fully complied with the terms of such offer more than two years before the Government's attempt to withdraw the selected lands from entry; by doing so the State converted the Government's offer of exchange into a contract of exchange, fully executed on its part, and in which it had acquired a vested right to have the Government carry out its part of the contract. In such a case, the Government is as much bound by the selection as is any private claimant who thereafter seeks to make entry of the selected land.

In this connection we call the attention of the court to the decision of the Secretary of the Interior, in Clarke v. Northern Pacific Railway Co., 30 L. D. 145, involving a selection made under the Forest Reserve Lieu land act of June 4, 1897. In that case the selected land, after selection but prior to approval by the Land Department, was included in a Presidential order withdrawing the land from disposal until it was determined whether it should be reserved for forest purposes. The question the Department was called upon to decide, was, as to whether or not the withdrawal or attempted withdrawal could affect Clarke's selection of the land already made, but not

yet approved. After quoting the extract from the McDonald case, 30 L. D. 124, already quoted in this brief, the decision of the Secretary proceeds as follows:

> "The same principle announced in the case of McDonald applies in the case at bar. If the lands selected by Clarke were subject to selection at the time he made selection thereof, and if, as appears to have been the case, the lands embraced in his deed of relinquishment and reconveyance were proper bases for his selections, he acquired, at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands. The lands embraced in his selections were therefore not subject to the said withdrawal, having been previously appropriated and segregated from the other public lands in said township by such selections."

That it is full compliance with the law that vests title, and not the determination by any tribunal that the law has been complied with, is very forcibly stated by the Secretary in that case in the following language:

> "The rights of the selector, however, attach and take effect at the point of time when he has done all that is incumbent upon him to do in the premises, and are not postponed to the time when that fact is ascertained and declared by the land officers."

What was said by the Secretary of the Interior in the McDonald case, 30 L. D. 124, in construing the Forest Reserve Lieu Land act, applies with equal force here, to the selection made by the State of Wyoming under the State Lieu Land Act, viz:

> "After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or the legislative branch of the government could divest him of the right thereby acquired."

This principle is well stated by this Court, speaking through Mr. Justice Brewer in Ballinger vs. United States, 216 U. S., 240, 249, in the following language:

> "Whenever, in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation."

The Court in Leonard v. Lennox, 181 Fed. 760-763, with great clearness and accuracy announced and applied this doctrine. That was a controversy between a claimant under a Soldier's Additional Homestead entry, and a party claiming under a coal land patent; the question at issue was as to the effect of the discovery of coal after the homesteader had fully complied with the law, but before the final approval of his entry by the Land Department.

In announcing the principles applicable to the case, the court said:

> "To entitle one to a patent it is essential, among other things, that he comply with all the requirements of the statute under which he seeks the title and the authoritative regulations of the Land Department thereunder.

"When the right to a patent under such a law as the soldier's additional homestead law depends upon whether the land is agricultural or is known to be chiefly valuable for coal, that question must be determined according to the conditions existing at the time when the applicant complies with all the requirements of the statute and the authoritative regulations. If at that time the land is not known to be chiefly valuable for coal, he acquires a right to a patent which will not be disturbed by a subsequent change in the conditions;

* * * * * * * * *

"The appellant insists that the action of the officers of the Land Department in respect of this evidence was right, even if the appellee had done all that he was required to do to entitle him to a patent, because his application had not been allowed or passed to entry. This insistence cannot prevail. It not only is opposed to the settled rule that the character of the land — whether agricultural or known chiefly valuable for coal — must be determined according to the conditions existing at the time when the applicant does all that he is required to do to entitle him to a patent, but is grounded in a misapprehension of the authority and duty of the officers of the Land Department in respect of such an application. Whilst it undoubtedly is subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, *but that they may ascertain whether or not the applicant has acquired a right to its allowance — a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises instead of at the time of its recognition by them.*"

(The italics are ours.)

19. The Function of the Land Department was not to Create Rights in the State but to Determine Rights Already Created.

Manifestly the *determination* by the Land Department (whenever that determination might be reached, whether in one year or fifty years) that the State surrendered such lands as were authorized to be surrendered and in the required manner, and properly selected such lands as the statute authorized to be selected, would not be the *creation* of the rights of the selector. The decision of the Land Department would be the mere judicial *ascertainment* of the rights already *created* by the selection, just as a decree of a court of equity quieting a plaintiff's title to real estate is not the creation of plaintiff's title, but the mere determination of the title already existing.

If it be conceded that all the facts exist entitling the selector to the approval of the Land Department, no power exists in that Department to withhold approval. That Department, the requisite facts being conceded, was not vested with any discretion in the matter. The offer being made by the sovereign nation to the sovereign state and accepted by the State, the only function of the Land Department was to ascertain judicially whether in fact the offer was so accepted. That Department had no authority or discretion to change or modify the terms of the offer or of the acceptance; nor did it have any authority to date the acceptance — to fix the point of time of the acceptance. That point of time was fixed by the acceptance itself. It seems to us that these conclusions follow from the decisions of this Court which we have cited in this brief, and we see nothing in the Cosmos case in the least in conflict with them.

20. No Jurisdiction elsewhere to Interfere with Court's Determination of the Facts.

In the case at bar the Land Department had reached a final decision upon the matter brought before it by the State's selection. That Department had refused to recognize the rights of the State acquired by compliance with the laws of the United States, and so far as it could do so had attempted to deprive the State of those rights. In this suit the whole controversy is brought before a court of ample jurisdiction. The suit is brought by the United States. All who have or claim any interest in the lands are made parties. The pleadings fully disclose each one's rights. The facts essential to the establishment of the rights of the State are all save one agreed. That one fact — the non-mineral character of the land at the time of the selection — is not denied — and is proven by the evidence without conflict and is found by the trial court. The attempted deprivation of the State of its interest in the land is thus brought before a court fully able to protect the rights of the State.

Cornelius v. Kessel, 128 U. S. 456, 461.

Black v. Jackson, 177 U. S. 349, 356.

Rector v. Gibbon, 111 U. S. 276, 291.

Martin v. Marks, 97 U. S. 345, 347.

Wirth v. Branson, 98 U. S. 118, 121.

Lessieur, et al. v. Price, 12 How. 59.

We submit that the decree of the Circuit Court of Appeals for the Eighth Circuit should be reversed,

and that the decree of the District Court for the District of Wyoming should be affirmed.

WILLIAM L. WALLS,
Attorney General of the State of Wyoming and of Counsel for Appellants.

D. A. PRESTON,
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APPENDIX

Section 4 of "An Act to provide for the admission of the State of Wyoming into the Union, and for other purposes." (26 Stat. 222-224.)

"SEC. 4. That sections numbered 16 and 36 in every township of said proposed state, and, where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal sub-divisions of not less than one-quarter-section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in such manner as the legislature may provide, with the approval of the secretary of the interior; *Provided*, That section 6 of the act of congress of August 9, 1888, entitled 'An act to authorize the leasing of the school and university lands in the Territory of Wyoming, and for other purposes,' shall apply to the school and university indemnity lands of the said state of Wyoming as far as applicable."

(R. S. Sec. 2275, as amended. Act Feb. 28, 1891, c. 384.)

"Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the

use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption of homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations; Provided, however, That nothing herein contained shall prevent any

State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

(R. S. Sec. 2276, as amended, Act. Feb. 28, 1891, C. 384.)

"That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to-wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one quarter and not more than one half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land; Provided, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships."

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 257.

THE STATE OF WYOMING ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLANTS.

WILLIAM L. WALLS,
Attorney General of the State of Wyoming, Solicitor and of Counsel for Appellants.

D. A. PRESTON,
H. S. RIDGELY,
HERBERT V. LACEY,
JOHN W. LACEY,
Of Counsel.

(27,497)

IN THE

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SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLANTS.

The appellants, under the permission given by the court at the hearing, file this supplemental brief on the question of the jurisdiction of the court.

As stated by the Assistant Attorney General on behalf of the Government, the answer in the cause shows a situation under which the matter of accounting is, in fact, nothing more than a name. The separate answer of the State of Wyoming, for example, on printed pages 26 and 27 of the record, discloses that the funds produced from the lands in controversy were not being taken or appropriated by the defendants, but, on the contrary, were deposited, as made, with

the Stockgrowers National Bank of Cheyenne, "to await the outcome of the determination of the title to the land, the money thus accruing to follow the title to the land."

This matter has since been put in a form agreed to by all parties here, by a stipulation in writing setting forth the facts. A copy of this stipulation is attached to this brief as an appendix. The original is filed with the clerk of this court.

From this stipulation it will be found that the answer is exactly true, and, further, that all the issues, proceeds, and profits, as arising, "have been and are continually deposited with the Stockgrowers National Bank of Cheyenne, of Cheyenne, Wyoming, as holder of such issues, proceeds, and profits, agreed upon and approved by all the parties, and that, under said agreement, all said issues, proceeds, and profits so deposited with said bank are, upon the final decision of this cause, to become the property of said appellee, in case such final decision shall directly or in effect declare the appellee entitled to hold the lands in controversy, and shall become the property of the appellants in case such final decision shall directly or in effect declare the appellants entitled to hold said lands as against the appellee."

The stipulation further in terms agrees, as a matter of fact, that "the final determination of the question to the right to the lands in controversy has at all times been and is, in fact, the full and final determination of every issue in the cause."

The stipulation further agrees, as a matter of fact, "that by said continual depositing of such issues, proceeds, and profits full accounting thereof and therefor has been and is being made as such issues, proceeds, and profits are produced, and no other or further accounting is, has been, or will be necessary."

Without discussing what would have been the situation in the absence of the statement made by the Assistant Attorney General and acquiesced in by the appellants at the hearing, as to the deposit of the funds, and without discussing the situation as it would have been had the stipulation above

mentioned not been made by the parties in this cause, as a stipulation of facts, it seems to us now entirely clear that there is no undetermined issue of fact. As the decree of the Circuit Court of Appeals now stands, the determination of the title to the land settles and determines every issue. The accounting is even less than ministerial. It is a mere turning over of the funds accumulated by the custodian agreed upon and approved by all the parties and with specific instructions to turn over such proceeds to the person or persons entitled, as above indicated.

There is no semblance, as it seems to us, to those cases where attempts have been made to bring appeals or writs of error to this court in fragments. The judgment as it stands seems to us not only final but complete, requiring no further judicial determination for its complete carrying into effect.

The case of Thomson against Dean, 7th Wall., 342, seems to us to settle the principle here involved. In that case the controversy related to the ownership and transfer of stock. "The decree directed that Dean, the defendant below and appellant here, transfer forthwith upon the books of the company one hundred and ninety-four shares of the stock to one of the plaintiffs below, who are appellees here, and ten shares to another. It directed further that an account be taken and stated as to the amount paid and to be paid for the stock and as to dividends accrued and to be credited under the contracts between the parties."

In passing upon the question of its jurisdiction this court used the following language:

> "In this case the decree directs the performance of a specific act and requires that it be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree. * * * We think that the current of decisions fully sustains the rule laid down by Chief

Justice Taney in the case of Forgay *vs.* Conrad, and which we again declare in his own language:

" 'When the decree decides the right to the property in contest and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed.' "

See also First National Bank *vs.* Shedd, 121 United States, 74.

Winthrop Iron Co. *vs.* Meeker, 109 U. S., 180.

Lewisburg Bank *vs.* Sheffey, 140 U. S., 445.

McGourkey *vs.* Toledo, etc., Railway, 146 U. S., 536.

Carondelet Canal & Navigation Co. *vs.* Louisiana, 233 U. S., 362.

Charles Glen Collins, appellant, *vs.* Frank M. Miller, United States Marshal, decided by this court March 29, 1920.

We submit that the court here has jurisdiction of the appeal on the ground that the decree here, under the facts as brought into the record by the stipulation, if not theretofore in the record, is final and complete.

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Of Counsel.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1920.

No. 257.

THE STATE OF WYOMING ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, *Appellee*.

Stipulation.

It is hereby stipulated and agreed by and between all the parties that, under an agreement between the parties made and entered into as soon as oil was discovered on the lands in controversy, all the issues, proceeds, and profits from said land, less an amount not in excess of the actual costs of operation, which amount has been exactly stipulated and agreed upon by the parties, have been and are continually deposited with the Stockgrowers National Bank of Cheyenne, of Cheyenne, Wyoming, as holder of such issues, proceeds, and profits, agreed upon and approved by all the parties, and that under said agreement all said issues, proceeds, and profits so deposited with said bank are, upon the final decision of this cause, to become the property of said appellee in case such final decision shall directly or in effect declare the appellee entitled to hold the lands in controversy, and shall become the property of the appellants in case such final decision shall directly or in effect declare the appellants entitled to hold said lands as against the appellee.

It is further stipulated and agreed that said issues, proceeds, and profits are now in the hands of said bank ready to

be turned over to the party or parties entitled thereto under said agreement, and that by said continual deposits of such issues, proceeds, and profits full accounting thereof and therefor has been and is being made as such issues, proceeds, and profits are produced, and no other or further accounting is, has been, or will be necessary, and that the final determination of the question of the right to the lands in controversy has at all times been and is, in fact, the full and final determination of every issue in the cause.

(Signed) FRANK K. NEBEKER,
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WILLIAM L. WALLS,
Attorney General of the State of Wyoming and of Counsel for Appellants.

(Signed) D. A. PRESTON,
H. S. RIDGELY,
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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE STATE OF WYOMING, H. S. RIDGELY, *and* THE MIDWEST REFINING COMPANY, *Appellants*, v. THE UNITED STATES. } No. 257.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal in this case (R. 84) is from a decree of the Circuit Court of Appeals for the Eighth Circuit, which reversed a decree of the United States District Court for the District of Wyoming, dismissing a bill (R. 1–6) brought by the United States to quiet its title to a certain tract of land in the State of Wyoming, for an injunction, an accounting and a receiver to take charge of and operate the property which contains valuable deposits of petroleum oil. Opinion, C. C. A., R. 79–83; 262 Fed. 675.

THE FACTS.

Upon its admission to the Union, the State of Wyoming, under the Enabling Act of July 10, 1890,

ch. 664, 26 Stat. 222, §4, was granted for the support of common schools sections 16 and 36 in every township, with a provision for indemnity where those sections or parts thereof had been sold, or otherwise disposed of. Section 13 (p. 224) of that Act declared that mineral lands should be exempted from the grants made thereunder.

Under the grant the State became the owner of a certain section 36, which subsequently and on February 22, 1897, was by Proclamation of the President of the United States included within the boundaries of the Big Horn Forest Reserve. R. 62–64. This of course did not affect the title of the State to the section.

Availing itself of the privilege accorded by sections 2275 and 2276, Revised Statutes of the United States, as amended by the Act of February 28, 1891, ch. 384, 26 Stat. 796 (U. S. Comp. Stats. 1916, Ann., §§ 4860 and 4861), the State of Wyoming on April 4, 1912, filed in the local land office at Lander, Wyoming, a selection list for a certain tract of land assigning as base therefor a part of said section 36.

Said sections 2275 and 2276 provided, so far as material here, that where sections 16 and 36 had been included within any reservation or had been otherwise disposed of by the United States, other lands nonmineral in character might be selected in lieu thereof.

It is conceded that the State complied with all the requirements and regulations of the Land Department in connection with the filing of the application.

When the application was received by the local officers at Lander and after the prescribed formalities had been conformed to, the application to select was forwarded to the Commissioner of the General Land Office for action.

Subsequently, but before the application was taken up for action by the Commissioner, the land applied for was included in an order of withdrawal, designated as Petroleum Reserve No. 32, Wyoming No. 8, made May 6, 1914, by the President of the United States under authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847, § 1 (U. S. Comp. Stats. 1916, Ann., § 4523). R. 60.

In view of said withdrawal, the Commissioner directed that notice be given the State of Wyoming that certification of the land to it would, if made, be with a reservation of the petroleum deposits under the Act of July 17, 1914, ch. 142, 38 Stat. 509 (U. S. Comp. Stats. 1916, Ann., §§ 4640a, b, c), unless application for classification were made, or a hearing applied for in order to show that the land was non-mineral.

The State declined to accept limited title (R. 41–44) whereupon the Commissioner held the selection for cancellation. R. 45–46. This action was affirmed by the Secretary of the Interior, upon the State's appeal (R. 46–49), and that was adhered to upon a motion for rehearing (R. 50–57), whereupon the application to select was rejected. R. 58.

After the withdrawal of the land as petroleum and after the notice of the ruling of the Commissioner of

the General Land Office that the State might elect to accept certification with reservation of petroleum deposits to the United States, the State on May 24, 1916, executed an oil and gas lease of the land it had attempted to select to one H. S. Ridgely, who assigned it to the Greybull Refining Company and that Company assigned it to The Midwest Refining Company. R. 3.

Thereafter drilling operations were commenced, 14 wells were brought in and the oil produced has been taken and disposed of by The Midwest Refining Company. At the date of the filing of the bill, January 28, 1918, it was estimated that there had then been extracted more than 100,000 barrels of oil. R. 4.

While the question of the rights of the State under this application was pending before the Land Department an agreement was entered into by that Department with the parties defendant, whereby the total gross proceeds of the oil produced, less ten cents per barrel allowed for operating expenses, were deposited in bank to abide the termination of the controversy. This agreement is still being carried out.

The bill as exhibited made only the several lessees defendants but the State of Wyoming applied for and was granted leave to intervene and answer. R. 18, 19, 29. Its answer (R. 20–28) is practically the same as the joint answer of defendants Ridgely and The Midwest Refining Company. R. 10–18.

Aside from the documentary evidence showing the status of the land and the steps taken in the Land

Department with respect to the selection list, which has been given in substance herein, the evidence (R. 30–65) consists of a stipulation (R. 30–31) to the effect that the State had good title to the base land, that the lieu land applied for was at the filing of the application unappropriated surveyed public land which as yet had not been classified as mineral, and that the State had so far as it could relinquished the base lands, but it was "not agreed by the Government to have been an actual relinquishment;" it was agreed, however, "that the State of Wyoming fully complied with any and all statutes, rules and regulations of the Land Department then existing, in so far as, if at all, such relinquishment was authorized by such statutes, rules or regulations." In other words, the stipulation as we construe it, is to the effect that the State had duly *tendered* a relinquishment of the base.

The defendants produced two witnesses who testified that at the date of the application and prior to withdrawal the land applied for was not known to be mineral in character. R. 65.

The Question Presented.

Under the record presented in this case the sole question for determination is:

> Whether in passing upon an application for selection such as the one in controversy, the Secretary of the Interior is limited to a consideration of conditions existing at the date of the filing of the application, without regard to

subsequent developments with respect to the land involved.

Propositions.

1. Until approval by the Secretary of the Interior, no title, legal or equitable, vests in the State under a lieu or exchange selection application.

2. The withdrawal of the land as mineral, and the establishment of its mineral character prior to approval, barred acquisition thereof by the State.

ARGUMENT.

I.

Until approval by the Secretary of the Interior, no title, legal or equitable, vests in the State under a lieu or exchange selection application.

It is not denied that the State had the right to exchange, under sections 2275 and 2276 of the Revised Statutes, lands within a National Forest, to which it had previously to the forestry withdrawal acquired title, for other public lands. That question is settled by the decision of this court in *California* v. *Deseret Water, Oil & Irrigation Co.*, 243 U. S. 415, 420.

Regarding the question as to vesting of title under a lieu selection application it is well settled that no legal or equitable title vests until approval.

The case of *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, involved an application to make a lieu or exchange selection under the so-called

Forest Reserve Act of June 4, 1897, ch. 2, 30 Stat. 11, 36, § 1, which provided that one holding an unperfected claim, or a patent, to lands in a forest reservation might relinquish said lands and select an equal area of non-mineral lands from the vacant public domain. This Act, it will be observed, is strikingly like the Act here under consideration. It was asserted in that case that upon the filing of a relinquishment of the lands claimed or owned, together with an application to select other lands, the selector secured an equitable title to the lieu lands applied for and that as those lands were not at the time of filing the application and tendering the relinquishment of the base lands known to be mineral, a subsequent showing or discovery of mineral did not affect the selection rights.

In disposing of these contentions this court said (pp. 311, 312):

> The ground upon which complainant insists that it is the equitable owner of the land selected is that it has relinquished a title in fee in a forest reservation, and has selected in lieu thereof vacant land open to settlement, and that the local land officers duly accepted, received, and filed the deed of the land relinquished, and the affidavit that the land selected was non-mineral, and that the officers duly entered such selection upon the official records of the land office, and then and there certified that the land selected was free from conflict, and that there was no adverse filing, entry, or claim thereto. Complainant asserts that was

all that it could reasonably do; that nothing remained on its part to do, and that when such is the case, the equitable title vests, and it is entitled to the protection of a court of equity to preserve and defend the title so acquired.

Counsel insists that the act of June 4, 1897, constitutes a standing offer on the part of the Government to exchange any of its "vacant land, open to settlement," for a similar area of patented land in a forest reservation, and that whenever a person relinquishes to the Government a tract in a forest reservation and places his deed to the Government of record as required by the Land Department rules, and selects in lieu thereof a similar area of vacant land, open to settlement, that such offer of the Government has thereupon been both accepted and fully complied with, and that a complete equitable title to the selected land is thereby vested in the selector.

* * * * *

We do not see how it can be successfully maintained that, without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show

necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land.

* * * * *

And at page 313:

Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office ior his consideration together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it.

* * * * *

Again at pages 314, 315:

> What may be the decision of the Land Department upon these questions in this case can not be known, but until the various questions of law and fact have been determined by that department *in favor of complainant* it can not be said that it has a complete equitable title to the land selected. [Italics ours.]

We regard the decision in the *Cosmos* case as decisive of the question in this case, but other authority upon this point is not lacking.

The Supreme Court of Oregon in the case of *State* v. *Hyde*, 88 Oreg. 1, considered the same question as to forest reserve selections, and speaking of the *Cosmos* case, said (pp. 15, 16):

> The court in that case was concerned particularly with the question of whether an equitable title to the selected lands had passed to the applicants. But the decision is instructive on the effect of a deed to the base lands. It is held that although the act of 1897 is a standing offer by the United States to exchange one class of lands for another, the exchange is not effected by the mere filing of the papers. In *Clearwater Timber Co.* v. *Shoshone County*, 155 Fed. 612, 620, it is held that title to the selected lands does not pass until final approval of the selection by the Commissioner of the General Land Office. If the title to the selected lands can not vest in the applicant without acceptance of the base lands by the General Land Office, it is fairly inferable that title to the base lands can not pass to the

United States until this bureau accepts the transfer. It is said in *Pacific Live Stock Co.* v. *Isaacs*, 52 Or. 54, 64 (96 Pac. 460), that:

"Neither party acquires any legal or equitable title in the lands proposed to be exchanged until the acceptance or final consummation thereof."

The construction which we place upon the decision in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, accords with its construction by the Interior Department.

* * * * *

It is squarely held by the federal court for this district in *United States* v. *McClure*, 174 Fed. 510, that title to the base lands does not pass to the United States until the deed is accepted by the General Land Office.

The principle laid down as to the vesting of title under an application to select lands within a railroad indemnity belt seems equally applicable to a filing like the one here in question.

It is well settled as to railroad indemnity lands that no title vests until the application to select is made *and* the same is approved by the Secretary of the Interior. *Sioux City & St. Paul R. R. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406, 408; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 391, 392.

We consider as pertinent to selections such as the one here in question, what was said concerning railroad indemnity selections in *Wisconsin Cent. R. R. Co.* v. *Price County*, 133 U. S. 496, at pages 511, 512:

The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until

> then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

In the case of *Buena Vista Land & Development Co.* v. *Honolulu Oil Co.*, 166 Calif. 71, the Supreme Court of California considered an application by the State of California, similar to and made under the same law as the one made by the State of Wyoming here, and it was held that no title passed and no vested right was acquired thereunder because the application had not been approved by the Secretary of the Interior, and that inasmuch as the land had been found to be mineral before the Secretary acted, he was without power to approve. The court in disposing of the case approved and adopted the decision of the Secretary of the Interior in a contest involving the same matter.

To the same effect are *Roberts* v. *Gebhart*, 104 Calif. 67, 69, 70, 71, and the holding of the Supreme Court of Minnesota in *Baker* v. *Jamison*, 54 Minn. 17, 27, 28.

It is important to observe that an application to select is not a selection in the sense in which the latter term is sometimes used in the adjudicated

cases. The word "selection" is often commonly used to designate *an application to select.* But in those cases where it is held that a selection vests title in the applicant the word "selection" means *approved selection.* As was said in *Wisconsin R. R. Co.* v. *Price County, supra* (p. 514): "They [selections] are not *considered as made until they have been approved, as provided by statute, by the Secretary of the Interior.*" [Italics ours.]

It is true the filing of a selection application operates to give the selector a preference right to the land as against one tendering a filing thereafter, unless the latter is in support of a settlement or right initiated prior to the filing. *Weyerhaeuser* v. *Hoyt,* 219 U. S. 380, 387, 388, 391, 392. In other words, the one who is first in time is first in right.

It is important to note that this principle applies to the relative rights of individual claimants but not to the rights of the United States to retain title. That distinction differentiates the present case from *Weyerhaeuser* v. *Hoyt, supra,* and what is said in the opinion in that case as to the doctrine of relation and the scope of the inquiry of the Secretary of the Interior in passing upon the application must be taken in connection with the question there under consideration—the relative rights of conflicting claimants. It is also important to note that in the *Weyerhaeuser* case the application had been approved and therefore the doctrine of relation was applicable.

That the filing of an application to select does not create rights as against the United States and that

the United States does not stand in the same position as a conflicting claimant, is shown by what was said in the opinion of this court in the case of *Stalker* v. *Oregon Short Line R. R. Co.*, 225 U. S. 142. The question there was as to the relative rights of a preemption entryman and the railroad company which claimed under the so-called right-of-way Act of March 3, 1875, ch. 152, 18 Stat. 482. The company had submitted for approval by the Secretary of the Interior a map showing the station grounds to which it claimed itself entitled under section 4 of said Act. After the map had been submitted and before it had been approved, the filing of the preemptor was made. It was held that the company's rights were superior but the court in its opinion used this significant language (p. 149):

> The principle is that which has been many times applied in conflicting claims to indemnity lands, under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been applied to lists of selections made by States to which a grant has been made subject to location. In both classes of cases, it has been many times ruled *that while no vested right against the United States is acquired until the actual approval of the list of selections*, the company does acquire a right to be pre-

> ferred over such an intervener. In other words, the patent, when issued, relates back to the initiatory right, and cuts off all claimants whose rights were initiated later. The question was fully reasoned out and the cases reviewed in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, and we can add nothing to the conclusiveness of that case. [Italics ours.]

After referring to and discussing the decision in *Minneapolis &c Railroad* v. *Doughty*, 208 U. S. 251, this court further said (p. 151):

> What is said in the opinion about the grant of a right of way being dependent upon the doing of three things—location of road, filing profile of it in the Land Office, and the approval thereof by the Secretary of the Interior—and that "*thereafter* all such lands over which such right of way shall pass shall be disposed of subject to such right of way," refers to the non-vesting of any right *as against the United States*, and not as denying the priority of right in the acquisition of the premises as *between parties* growing out of priority of application.

But, say appellants, the State had done all that was demanded of it to complete its selection, it had conformed to all the statutory and departmental requirements, hence the Secretary in approving the selection application is limited to a consideration of the conditions existing when the State had done these things.

We do not attempt to deny the well settled rule that where one has done all that is required of him

with respect to securing a tract of public land, he acquires rights against the Government and conditions arising after that time are not to be considered in determining his right to the land. But that rule is founded upon the theory that by such compliance with the law the applicant has acquired an *equitable title* to the land; that in equity the land is his and the Government holds it in trust for him. *Wirth* v. *Branson*, 98 U. S. 118, 121; *Cornelius* v. *Kessel*, 128 U. S. 456 459; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432–434.

Obviously the rule has no application to a case in which the performance of some act by a public official is a condition precedent to the vesting of an *equitable title*. In such a case the mere fact that the applicant has performed all of the acts required of him does not suffice. The case at bar is one in which it was required that the proper officials of the Land Department should approve applications for lieu land selections. The mere filing of an application therefore did not suffice to pass the equitable title.

II.

The withdrawal of the land as mineral, and the establishment of its mineral character prior to approval, barred acquisition thereof by the State.

The withdrawal of the selected land by the President was made under authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847.

Section 1 of that Act (U. S. Comp. Stats. 1916 Ann., §4523) is as follows:

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

We take it that there is no question raised as to this power of withdrawal, in general, but understand appellants' contention to be that it is inoperative as to the land here in controversy because the application antedated the withdrawal. But, as we have seen, the equitable title did not pass at all because the application was never approved.

Moreover, section 2 of the Act of June 25, 1910, as amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497 (U. S. Comp. Stats. 1916 Ann., § 4524), particularly enumerates the kind of claims or filings which are exempted from the force and effect of such withdrawals. That section reads:

> That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the

diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

It will be perceived that but five kinds of claims or entries are saved, viz: claims for metalliferous minerals, under the mining laws; oil or gas claims which had not proceeded to discovery but upon

which there was at date of withdrawal diligent prosecution of work leading to discovery, thereafter continued to discovery; homestead or desert land entries, and settlement claims previously initiated. Now, had Congress intended that other claims should be excepted it would have so declared.

The uniform holding of the Land Department with respect to such cases is evidenced by its Administrative Ruling in 43 L. D. 293, in which it was declared (syllabus):

> No such right is acquired by a forest lieu, railroad, or State selection, prior to approval thereof by the proper officer of the United States, as will except the land from withdrawal by the government under the act of June 25, 1910.

The Secretary said (p. 293):

> This question, therefore, is now presented: Is the Secretary of the Interior free to dispose of these selected lands, in the face of the act of Congress withdrawing them from disposition?
>
> It is my conclusion, after a careful study of the authorities, that no such authority has been given to the Secretary of the Interior. The acts of Congress authorizing exchanges are merely offers on the part of the United States to exchange other lands for lands held by the selector, and the right of the selector does not attach nor equitable title pass upon mere presentation of the requisite papers. There remains the necessity for action upon the offer by the duly authorized officer of the United States. Until that acceptance has

> been given and the equitable title passed, Congress has full authority to devote the land to a public purpose.

and (p. 294):

> Congress having power to withdraw lands and devote them to a public use, notwithstanding the existence of the inchoate claims mentioned, having authorized the withdrawals and reservations by the act cited, and withdrawals having been made for public purposes, as prescribed in the act, the Secretary of the Interior has no power or authority to approve or accept such selections or exchanges or to relieve them from the force and effect of an existing reservation.

Numerous authorities are cited to support that conclusion. P. 294.

Such a filing as the one now under consideration is obviously unlike homestead or other claims upon which final proofs have been submitted and in which the claimants have done all that is necessary under the law to vest them with an equitable title.

It is well established, also, that mere settlement upon lands of the United States with a declared intention to obtain title thereto under the preemption laws does not give a vested interest in the premises so as to deprive Congress of the power to divest it by grant to another. *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77.

This principle was approved in *Shepley* v. *Cowan*, 91 U. S. 330, although that case was distinguished from the two just cited. In that case it was said,

referring to *Frisbie* v. *Whitney* and *The Yosemite Valley Case* (p. 338):

> In those cases the court only decided that a party, by mere settlement upon the public lands, with the intention to obtain a title to the same under the preemption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, lighthouses, hospitals, custom-houses, court-houses, or other public purposes for which real property is required by the government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as *against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition conferred upon Congress by the Constitution only ceased when all the preliminary acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived.

The case of *Russian-American Packing Co.* v. *United States*, 199 U. S. 570, may be helpful. In that case the Packing Company, without authority

or license from the United States, took possession of a tract of land on an island off the coast of Alaska, erected buildings, machinery, etc., at a cost of about $45,000. Subsequently, an Act was passed (Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1100), which provided that a corporation such as the Packing Company might purchase not more than 160 acres of land. Under this Act the Company applied for a survey and made a deposit to cover the cost thereof; the survey was made, but before approval by the Commissioner of the General Land Office, the land was withdrawn and reserved for a fish culture station.

It further appears that by a section of the Act of 1891 it was declared that the provisions relating to acquisition of lands should not be construed to warrant the sale of any lands which should be selected for fish culture stations. The court, referring to that section (§ 14), held that regardless of that section no rights were acquired against the Government, and said (pp. 577, 578):

> Even if section 14 had not been enacted, it would not follow that petitioner, by sections 12 and 13, became entitled to a patent of the United States by procuring a survey of such lands. We have had occasion in several cases to hold that, although the occupation and cultivation of public lands with a view to preemption confers a preference over others in the purchase of such lands by the *bona fide* settler, which will enable him to protect his possession against other individuals, it does not confer a vested right as against the United States in the land so occupied. Such a vested

> right, under the preemption laws, is only obtained when the purchase money has been paid, and receipt from the proper land officer given to the purchaser. Until this has been done it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler. *Frisbie* v. *Whitney*, 9 Wall. 187. When this payment is made, the other prerequisites having been complied with, the settler is then entitled to a certificate of entry from the local land office and ultimately to a patent. *The Yosemite Valley Case*, 15 Wall. 77, 87; *Campbell* v. *Wade*, 132 U. S. 34, 38; *Shiver* v. *United States*, 159 U. S. 491.

Again, in the case of *Wagstaff* v. *Collins*, 97 Fed. (C. C. A.) 3, it was said (p. 8):

> It is urged, however, * * * that the complainants' ancestor had acquired a vested right in the land by virtue of his homestead claim and residence thereon, of which neither he nor his heirs could be deprived by subsequent legislation, and that the complainants are therefore entitled to the land, to the exclusion of the purchasers from the railway company, although Congress clearly intended to confirm the purchasers' title. We are not able to assent to this proposition. In the case of *Shiver* v. *U. S.*, 159 U. S. 491, 495, 16 Sup. Ct. 54, the doctrine was fully approved that an entry upon public land accompanied by residence thereon, in pursuance of such permission as is given by the land laws of the United States, confers no vested interest in

the land until the settler has remained in possession for the length of time or done the acts which under the law entitled him to a patent. Such a settlement, it was said, protects the settler from intrusion by others, but confers no rights as against the United States. This court in *Norton* v. *Evans*, 49 U. S. App. 669, 27 C. C. A. 168, and 82 Fed. 804, 807, also applied the same rule, that had long been applied to preemption claimants, to a homestead claimant, holding that an entry by the latter "creates no vested rights as against the United States, and does not interfere with the power of Congress by subsequent legislation to dispose of the land;" citing *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77; *Buxton* v. *Traver*, 130 U. S. 232, 9 Sup. Ct. 509; *Campbell* v. *Wade*, 132 U. S. 34, 10 Sup. Ct. 9.

Appellants invoke the doctrine of relation and it is undoubtedly true that upon the issuance of a patent or the approval of an application to make a selection, the title acquired relates back to the initiatory steps taken to secure the patent or the approval. But how can it be said that the approval relates to a date antecedent to the withdrawal when there has been no approval?

The doctrine of relation involves a legal fiction by which an act performed on a given date is deemed to have been performed at an earlier date. Of course if the act is never performed the fiction can not be indulged. *United States* v. *Detroit Lbr. Co.*, 200 U. S. 321, 334.

The doctrine of relation was sought to be invoked in the case of *United States* v. *Morrison*, 240 U. S. 192. That case involved a grant to the State of Oregon of "school sections." A survey had been made in the field, that survey had been approved by the Surveyor General of Oregon, had been submitted to the Commissioner of the General Land Office who called for an additional report on a matter of detail, and this report had been furnished. Thereafter, but before formal approval of the survey by the Commissioner, which when given was without change or correction of the survey or plat, the land was temporarily withdrawn for forestry purposes.

In holding that the formal approval of the survey was necessary before the rights of the State attached to the land in controversy, this court said (p. 212):

> Again, it is urged that the survey when approved related back to the date of the grant or at least to the date of the survey in the field. The former contention is but a restatement in another form of the argument that Congress could not dispose of the land pending the survey which as we have seen is answered by the terms of the grant; and if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. *The doctrine of relation can not be invoked to destroy this authority.* [Italics ours.]

But there is yet another point. The selected land is *mineral in character.*

If we consider that sections 2275 and 2276 of the Revised Statutes constitute a grant, it is clear that this land can not pass to the State, since mineral lands were excepted. The case would therefore fall within the rule of *Barden* v. *Northern Pacific R. R.*, 154 U. S. 288; *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669; *United States* v. *Southern Pacific Co.*, 251 U. S. 1; *United States* v. *Sweet*, 245 U. S. 563.

If, however, the sections be construed as conferring merely a privilege of exchange, then the case would come under the rule that until equitable title passes, in this case until approval, the matter of the character of the land is open to determination. *Leonard* v. *Lennox*, 181 Fed. 760.

Again, even if the transaction is in the nature of a contract, created by the acceptance by the State of the invitation or privilege given by the United States, we assert that the State is bound by the terms offered, one of which was that only non-mineral land might be selected. Certainly the State could not expect that its own showing as to the character of the land was to be conclusive and to bar the right of the United States, through its proper officer, from inquiring into that matter. As was said in *Roughton* v. *Knight*, 219 U. S. 537, 547: "Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency *and an assent to the particular selection made in lieu.*" [Italics ours.]

The case of *Daniels* v. *Wagner*, 237 U. S. 547, is said to be applicable. We fail to see that it has any bearing on this case.

That case arose out of erroneous action by local land office officials in rejecting a lieu selection tendered by Daniels and permitting subsequent entries to be made by others under various laws. The Land Department repeatedly instructed the local land office to allow the lieu selection, but this was not done. When the matter was before the Secretary upon an appeal from a ruling of the Commissioner of the General Land Office that the lieu selection was valid and directing that it be allowed, the Secretary found the filing regular and that it should have been allowed; but, in view of the allowance of subsequent entries, held (p. 556):

> It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition. See *Hoyt* v. *Weyerhaeuser et al.*, 161 Fed. Rep. 324.

When the case came to this court it was held that as between the rival claimants there was no discretion in the Secretary to deny a right to which one of them admittedly had become entitled. No right or power of the Government to retain title to its own lands was involved; it was merely a matter of determining which

claimant had the prior right. The decision was in effect an application of the doctrine of priority laid down in *Weyerhaeuser* v. *Hoyt*, *supra*.

Referring to the *Cosmos* case, the court in its opinion said (pp. 560, 561):

> In the first place we can discover no reason for holding that the *Cosmos* case either expressly or by any reasonable implication sustained the assumption that there existed in the Land Department in the case of lieu land entries, or any other the vast latitude of discretion involved in the proposition which was sustained. It is true in the *Cosmos* case it was decided that courts would not interfere with the right of the Department to pass upon a question which it had the power to decide as a prerequisite to allowing a lieu entry under the Act of 1897, but that ruling has no relation to the question of the right of the Department after it had passed on the prerequisites required for the entry under the Act of 1897 and after it had decided that they had all been complied with, to deny the right of the applicant to enter and under the theory of a discretion possessed to permit a later applicant to take the land, thus depriving the first applicant of the right conferred upon him by the Act of Congress. The difference between the two is that which must obtain between the power to decide on the one hand whether the prerequisites to an entry exist and the right on the other of the Land Department after finding that an applicant has fully complied with the law and is entitled

to make the entry which he asks, to permit somebody else to enter the land under the assumption that the law vests a discretion which enables that to be done.

It is true again that in the *Cosmos* case the court declined to hold that the Department was not at liberty to determine the question as to the mineral character of the lands sought to be entered because that inquiry arose after entry and before its final allowance, a ruling which but in a different form illustrates the broad distinction which we have just pointed out. It is also true that *Weyerhaeuser* v. *Hoyt* concerned a question of the selection of indemnity lands by a railroad company under a railroad grant, but the reasoning in that case, we are of opinion, in the very nature of things is repugnant to the possibility of the possession of the discretionary power in the Department here asserted.

CONCLUSION.

It follows that the decree of the Circuit Court of Appeals was right and should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 257.—October Term, 1920.

The State of Wyoming, et al., Appellants, vs. The United States. } Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[March 28, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit by the United States to establish title in it to eighty acres of land and to the proceeds of oil taken therefrom. The District Court rendered a decree dismissing the bill on the merits, which the Circuit Court of Appeals reversed, 262 Fed. Rep. 675, and the defendants bring the case here.

One of the defendants, the State of Wyoming,* claims under a lieu selection, made in 1912, and the other defendants under a lease from the State, made in 1916. It is against the selection and the lease that the United States seeks to establish title.

By the act of July 10, 1890, c. 664, § 4, 26 Stat. 222, Congress granted to the State for the support of common schools certain lands in place (sections 16 and 36 in each township), with exceptions not material here; and by the act of February 28, 1891, c. 384, 26 Stat. 796, amending §§ 2275, 2276, Rev. Stat., the State was invited and entitled, in the event any of the designated lands in place after passing under the school grant should be included within a public reservation, to waive its right thereto and select in lieu thereof other lands of equal acreage from unappropriated non-mineral public lands outside the reservation and within the State. See *California* v. *Deseret Water, etc. Co.*, 243 U. S. 415; *Payne* v. *New Mexico, ante*, p. —. Other laws of general application, §§ 441, 453, 2478, Rev. Stat., required that the

*The State was not made a party at first, but afterwards at its own request was admitted as a defendant to enable it to defend the lieu selection.

selections be made under the direction of the Secretary of the Interior.

In 1907 a tract in place which had passed to the State under the school grant was included within a public reservation, called the Big Horn National Forest. On April 4, 1912, the State—through its Governor, Joseph M. Carey, and its Land Commissioner, S. G. Hopkins—filed in the proper local land office a selection list waiving its right to that tract and selecting in lieu thereof other land of the same area from public lands within the State and outside the forest reserve. The land so selected included the eighty acres now in controversy. At that time the State had a perfect title to the tract in the reserve and the land selected in lieu thereof was vacant, unappropriated, and neither known nor believed to be mineral. The list fully conformed to the directions on the subject issued by the Secretary of the Interior and was accompanied by the requisite proofs and the proper fees. Notice of the selection was regularly posted and published, proof thereof was duly made and the State paid the publisher's charge. Thus, as the Circuit Court of Appeals said, "the State did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the government, and everything that was required either by statute or regulation of the Land Department" in selecting the lieu land instead of the relinquished tract.

No objection was called forth by the notice and in regular course the local officers transmitted the list and other papers to the General Land Office with a certificate stating that no adverse filing, entry or claim to the selected land was shown by the records in their office and that the filing of the list was allowed and approved by them. The list remained in the General Land Office awaiting consideration by the Commissioner for upwards of three years. In the meantime, on May 6, 1914, two years after the selection, the selected land, with other lands aggregating more than 88,000 acres, was included in a temporary executive withdrawal as possible oil land under the act of June 25, 1910, c. 421, 36 Stat. 847. On April 29, 1915, the Commissioner, coming to consider the selection, declined to approve it as made and called on the State either to accept a limited—surface right—certification of the selected land or to show that it still was not known or believed to be mineral. The State declined to accede to either alternative and insisted that

its rights should be determined as of the time when the waiver and selection were made and that, applying that test, it became invested with the equitable title to the selected land two years prior to the temporary withdrawal and at a time when that land plainly was neither known nor believed to be mineral. The Commissioner thereupon ordered the selection canceled,—not because it was in any respect objectionable when made, but on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and subsequent oil discoveries in that vicinity. The State appealed to the Secretary of the Interior, and, on October 25, 1916, he affirmed the Commissioner's action.

In the meantime, on May 24, 1916, the State had given to the defendant Ridgely a lease permitting him to drill the selected land for oil, and the lease had been assigned to the defendant oil company. There was no oil discovery, nor any drilling, on the selected land up to the time the lease was given; but thereafter the oil company began drilling and at large cost carried the same to discovery and successful production. This was four years after the selection.

The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, and that nothing remained to be done by the State to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove and reject it on the ground that the selected land was withdrawn two years later under the act of June 25, 1910, and still later was discovered to be mineral land, that is, to be valuable for oil. Or, putting it in another way, the question is whether it was admissible for those officers to test the validity of the selection by the changed conditions when they came to examine it, instead of by the conditions existing when the State relinquished the tract in the forest reserve and selected the other in its stead.

In principle it is plain that the validity of the selection should be determined as of the time when it was made, that is, according to the conditions then existing. The proposal for the exchange of land without for land within the reserve came from Congress. Acceptance rested with the State and of course would be influenced and controlled by the conditions existing at the time. It is not as if the selection was merely a proposal by the State which the land

officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the State's waiver and selection met the requirements of the congressional proposal and of giving or withholding their approval accordingly. The power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised;—in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then—if they met all the requirements of the congressional proposal, including the directions given by the Secretary—they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected. Of course the State's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price.

The conclusion which we deem plain in principle is fully sustained by prior adjudications. In *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, which presented the question of when under the public land laws a right to the land becomes vested, it was said, p. 431: "When the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." And again, p. 432: "It is a general rule, in respect to the sales

of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership." In *Colorado Coal and Iron Co.* v. *United States*, 123 U. S. 307, a title obtained through preëmption cash entries was assailed on the ground that the land was shown by subsequent discoveries to be mineral; but the attack failed, the court saying, p. 328: "A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of sale. The question must be determined according to the facts in existence at the time of the sale." In *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, a title acquired through an application for a placer patent was sought to be annulled on the ground that subsequent mining disclosed that the land was lode land; but the title was sustained, the court observing, p. 683: "The subsequent discovery of lodes upon the ground, and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time." Particularly in point is *Shaw* v. *Kellogg*, 170 U. S. 312, which related to what is called Baca Tract No. 4. Congress had accorded to the heirs of Luis Maria Baca the right to relinquish their claim to a large body of land in New Mexico and to select instead "an equal quantity of vacant land, not mineral," in not exceeding five tracts in that Territory. As here, there was no provision for a patent. The original claim was relinquished and the lieu selection made conformably to directions given by the Land Department, the selected land being represented as vacant and not known to be mineral. Afterwards the selection of a part of Tract No. 4 was called in question on the ground that it was shown by subsequent discoveries to be mineral. This court sustained the

selection and said, p. 332: "The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, preëmption or townsite entries, the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral." In *Leonard* v. *Lennox*, 181 Fed. 760, a contention that an application for a non-mineral final entry, even if regularly presented and based on full compliance with the law, should be disallowed and rejected where the land subsequently is discovered to be mineral (coal) was overruled by the Circuit Court of Appeals of the Eighth Circuit, the court saying, p. 764: "This insistence cannot prevail. It not only is opposed to the settled rule that the character of the land—whether agricultural or known to be chiefly valuable for coal—must be determined according to the conditions existing at the time when the applicant does all that he is required to do to entitle him to a patent, but is grounded in a misapprehension of the authority and duty of the officers of the Land Department in respect of such an application. Whilst it undoubtedly is subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, but that they may ascertain whether or not the applicant has acquired a right to its allowance—a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises instead of at the time of its recognition by them." The last expression on this subject in this court is found in *Payne* v. *New Mexico*,

ante, p. —, where it was held in respect of a state lieu selection like the one in question here that the Commissioner and the Secretary in acting thereon are required to give effect to the conditions existing when it was made, that if it was valid then they are not at liberty to disapprove or cancel it by reason of a subsequent change in conditions and that in this regard the statute under which the selection was made does not differ from other land laws offering a conveyance of the title to those who accept and fully comply with their terms.

The Land Department uniformly has ruled that the States acquire a vested right in all school sections in place which are not otherwise appropriated, and not known to be mineral, at the time they are identified by the survey,—or at the date of the grant where the survey precedes it,—regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or affected by a subsequent mineral discovery. *California* v. *Poley*, 4 Copp's L. O. 18; *Abraham L. Minor*, 9 L. D. 408; *Rice* v. *California*, 24 L. D. 14; *United States* v. *Morrison*, 240 U. S. 192, 207; *United States* v. *Sweet*, 245 U. S. 563, 572. And as respects cash entries and entries under the preëmption, homestead, desert land and kindred laws the Land Department always has ruled that if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral he acquires a vested right which no subsequent discovery of mineral will divest or disturb. *Harnish* v. *Wallace*, 13 L. D. 108; *Rea* v. *Stephenson*, 15 L. D. 37; *Reid* v. *Lavellee*, 26 L. D. 100, 102; *Aspen Consolidated Mining Co.* v. *Williams*, 27 L. D. 1, 17; *Diamond Coal and Coke Co.* v. *United States*, 233 U. S. 236, 240. And this rule has been applied by that department, although not uniformly, to selections made in lieu of relinquished lands in public reservations. Thus in *Kern Oil Co.* v. *Clarke*, 30 L. D. 550, where a lieu selection under the act of June 4, 1897, c. 2, 30 Stat. 36, was under consideration, the Secretary of the Interior said, p. 556: "When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter

the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring can impair or in any manner affect his rights." Again, p. 560: "These established principles, in the opinion of the Department, are applicable to selections under the act of June 4, 1897. The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the government for title received." And again, p. 564: "It would be strange indeed, if by the latter [1897] act, Congress intended that one who, accepting the government's offer of exchange, relinquishes a tract to which he has obtained full title in a forest reservation, and in lieu thereof selects a tract of land which at the time is vacant and open to settlement, and does all that is required of him to complete the selection and to perfect the exchange, should thereby acquire only an inchoate right to the selected tract, liable to be defeated by subsequent discoveries of mineral at any time before patent, or before final action upon the selection by the land department. Such a construction would not only tend to defeat the objects for which the act was passed, by discouraging owners of lands in forest reservations from giving up their titles, but would be against both the letter and spirit of the act. Parties would be slow indeed to relinquish their complete titles if it were once understood that they could obtain only doubtful or contingent rights in return for them. It could not have been the intention of Congress that parties accepting the government's offer of exchange should be embarrassed by any such conditions of doubt and uncertainty."

That view was repeated and applied in many other departmental decisions dealing with lieu selections. But afterwards the Secretary, conceiving that the decisions of this court in *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, and *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, justified him in so

doing, ruled that no right attached under such a selection unless and until it was approved by him and therefore that, even though the selection was lawfully made, he possessed a discretion to reject it and give effect to an intervening change in conditions, as where a new claimant settled upon the land or sought to make entry of it while the selection was pending.

Under this changed ruling the Secretary rejected several selections lawfully made by one Daniels and awarded and patented the land to others. Daniels then brought suits against the patentees charging that by the selections he acquired the equitable title, that his selections were rejected and the patents issued through a misapprehension of the law, and therefore that the patentees took the legal title in trust for him. Ultimately the suits came to this court, and after a full review the changed ruling of the Secretary was disapproved and Daniels' contention sustained. *Daniels* v. *Wagner*, 237 U. S. 547. The substance of the decision was that as the selections were lawful when made "it was the plain duty" of the Secretary to approve them; that the contrary view found no justification in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co., supra;* and that the real authority and duty of the Secretary in dealing with such selections were pointed out in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387-388, where it was said: "The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the Secretary. The scope of the power to approve lists of selections conferred on the Secretary was clearly pointed out in *Wisconsin Central Railroad* v. *Price*, 133 U. S. 496, 511, where it was said that the power to approve was judicial in its nature. Possessing that attribute the authority therefore involved not only the power but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections."

As the Circuit Court of Appeals in the present case, like the Secretary in the other, regarded the decisions in the *Wisconsin Central* case and the *Cosmos* case as showing that no right attaches under a lieu selection unless and until approved by the Secretary, it is well to point out just what was involved in those cases; for

it then will be apparent that there was no purpose in either to go to the length suggested.

The *Wisconsin Central* case was a suit to enjoin the collection of a tax levied on land which at the time was covered by a pending indemnity selection under a railroad land grant. The Commissioner of the General Land Office had reported that the company already had received indemnity lands largely in excess of the losses for which it was entitled to indemnity, and the company was disputing that report. Until that controversy was determined it could not be known whether the company was entitled to an approval of the selection. In that situation the United States had such an interest in the land as made it non-taxable. Whether the selection was valid or otherwise was primarily a question for the Secretary of the Interior to determine. Ultimately he held it valid, but not until after the tax was levied—indeed, after the suit was brought. The suit involved the validity of the tax, and nothing more. Its purpose was not to control the action of the Secretary by a writ of mandamus or injunction, nor to determine the title as between the United States and the company or between the company and a grantee of the United States. True, the court, after commenting on the difference between the granted lands in place and the indemnity lands as respects the mode of identification, very broadly stated that an indemnity selection to be effective required the approval of the Secretary; but it was not meant by this that the Secretary arbitrarily could defeat the right of selection by withholding his approval, nor that if through a mistake of law he rejected a selection which was valid at the time it was made the company would be remediless. There was no occasion to consider those questions, nor could they properly be determined without the presence of parties not then before the court. And that the court did not intend its words to be taken so broadly is illustrated by the fact that it cited with approval the case of *Saint Paul and Sioux City R. R. Co.* v. *Winona and Saint Peter R. R. Co.*, 112 U. S. 720, 733, wherein an indemnity selection lawfully made, but disapproved by the Secretary, was sustained against an adverse certification on the ground that "this erroneous decision of his" did not deprive the selector "of rights which became vested by its selection of those lands."

The *Cosmos* case was a suit by a lieu land selector to establish his title as against others who were claiming under placer mining locations. The selection was not accompanied by proof that the land was not then occupied adversely, although that was required. Within the time prescribed by the regulations the mining claimants filed in the land office verified protests assailing the regularity and validity of the selection, setting up locations of the selected land made under the placer mining law prior to the selection and alleging that the lands "were not subject to selection" because "the same was mineral land and was included within" the mining locations. The protests were entertained and, with the selection, were pending when the suit was begun, which was shortly after the protests were filed. The suit was brought on the theory that by the selection the selector acquired "the full, complete and equitable title" to the selected land, notwithstanding he had not submitted any proof of non-occupancy, and that the protests were not such as could be entertained or investigated by the Land Department. That case and another (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316), wherein a writ of mandamus was sought against the Secretary by another lieu land selector, were heard and disposed of as related cases, and the decision in one should be read in connection with that in the other. The full substance of the decision in the *Cosmos* case is in the following excerpt from the opinion, 190 U. S. 315: "Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such question themselves. The Government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction cannot be taken away from it by the courts. *United States* v. *Schurz*, 102 U. S. 378, 395. The bill is not based upon any alleged power of the court to prevent the taking out of mineral from the land, pending the decision of the Land Department upon the rights of the complainant, and the court has not been asked by any averments in the bill or in the prayer for relief to consider that question. For the reasons stated, we think the bill does not state sufficient facts upon which to base the relief asked for, and that the defendants' demurrer to the same was

properly sustained." There are general expressions in the opinion, which separated from the rest, might be taken as declaring that no right vests under a lieu selection unless the Secretary approves it; but that such a ruling was intended is refuted by the opinion as a whole, and particularly by the statements therein that the power of the Secretary is not to be exercised arbitrarily and that his "decision of any legal question would not, of course, be binding on the courts" should the question properly arise in future litigation. The general expressions were relied upon in *Daniels* v. *Wagner* as interpretative of the decision and this court answered, "But we are of opinion that this interpretation of the *Cosmos* case cannot be justified." Besides, it was adjudged in the *Daniels* case that a lieu selection which is lawful at the time it is made does invest the selector with equitable rights which he may enforce in an appropriate way where the Secretary through an error of law rejects the selection. And that ruling was reaffirmed and applied in *Payne* v. *Central Pacific Ry. Co., ante,* p. —, and *Payne* v. *New Mexico, ante,* p. —.

The only exception to the general rule before stated respecting the time as of which the character of the land—whether mineral or non-mineral—is to be determined is one which in principle and practice is confined to railroad land grants. From the beginning the Land Department, by reason of the terms of those grants and the restrictive interpretation to which they are subjected, uniformly has construed and treated them as requiring that the character of the land be determined as of the time when the patent issues. In 1890 Secretary Noble, in declining to disturb this construction and practice, pointed out the reasons which had led the Department to make a distinction in this regard between those grants and other land laws, and said: "This practice, having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned. It has, in effect, become a rule of property." *Central Pacific R. R. Co.* v. *Valentine,* 11 L. D. 238, 246. In 1893 the matter came before this court and the construction and practice of the Land Department were sustained. *Barden* v. *Northern Pacific R. R. Co.,* 154 U. S. 288. As the opinion in that case shows, the court recognized that the mineral

land exception in other land laws simply operates to exclude from sale, etc., "land known at the time to be mineral," and was careful to explain that its decision related to "grants in aid of railroads" and to "no other grants." The grounds on which the decision was put were, (a) that the railroad land grants, besides being confined in the granting clause to lands "not mineral," contain provisos declaring in words or effect "that all mineral lands be, and the same hereby are, excluded from the operation of this" grant; (b) that such grants, although expressly requiring that the question whether the lands are otherwise excepted be determined as of the time the map of definite location is filed, contain no such provision in respect of the exception of mineral land; (c) that it was well understood that many years would necessarily elapse between the filing of the map and the time when by construction of the road the grantee would be entitled to patents, and as the grants covered great areas, in one instance nearly equal to that of Ohio and New York, it hardly could have been intended to arrest mineral development in those areas in the meantime; (d) that such grants "must be strictly construed," and "if they admit of different meanings, one of extension and one of limitation, they must be accepted in a sense favorable to the grantor;" and (e) that the long prevailing construction and practice of the Land Department ought not to be disturbed. Plainly the decision in that case is without bearing here, save as it recognizes that rights under other land laws are to be tested by a different rule. And this is emphasized by the fact that in *Shaw* v. *Kellogg*, *supra*, where the selection of Baca Tract No. 4 was involved, the court distinguished the *Barden* case, and applied the general rule before stated. And it is of further significance that this court has recognized that the legislation of Congress designed to aid the common schools of the States is to be construed liberally rather than restrictively. *Beecher* v. *Wetherby*, 95 U. S. 517, 526; *Johanson* v. *Washington*, 190 U. S. 179, 183.

Of the executive withdrawal of the land two years after the lieu selection was lawfully made, it suffices to say, following the recent decision in *Payne* v. *Central Pacific Ry. Co.*, *ante*, p—, that the act of 1910, under which the withdrawal was made, is confined to "public lands," that by the selection this land had ceased to be

public, and that the act could not be construed to embrace it without working an inadmissible interference with vested rights.

It results that the Secretary erred in matter of law in rejecting the selection and that the District Court rightly entered a decree for the defendants. See *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *United States* v. *Detroit Timber Co.*, 200 U. S. 321, 338. The decree of the Circuit Court of Appeals is accordingly

Reversed.

A true copy.

Test:

Clerk Supreme Court, U. S.